Supreme Court, U.S.
FILED
AUG 12 2016
OFFICE OF THE CLERK

No. 15-1251

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
BENJAMIN M. SHULTZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA J. DREEBEN
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Many important government posts must be filled by persons who are nominated by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, under Section 3345(a)(1); a person occupying another office in the Executive Branch that is required to be filled through the process of presidential appointment and Senate confirmation, who is designated by the President under Section 3345(a)(2); or a senior official in the same agency designated by the President under Section 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "[n]othwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(b)(1).

The question presented is whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement:
A. Statutory background 2
1. Appointments practice before enactment of the Federal Vacancies Reform Act of 1998 4
2. Perceived abuses spur congressional protest 6
3. The FVRA is proposed to curb perceived circumvention of the Vacancies Act 8
4. The White House and Members of Congress insist on changes to give the President more flexibility 10
5. Beginning immediately after its enactment, Subsection (b)(1) is construed to limit only first assistants 13
B. Proceedings in this case 17
Summary of argument 20
Argument 25
A. The manner in which the FVRA has been understood since its enactment represents the best reading of the FVRA's text and structure 26
B. While the settled construction of the FVRA accords with the statute's design, the court of appeals' reading creates anomalies 37
C. The settled construction of the FVRA best accords with the statute's legislative history 45
D. The manner in which the FVRA has been understood since its enactment confirms the meaning of the plain text 48
Conclusion 55

Table of Contents—Continued: Page

Appendix A — Chart: Officials whose acting service under 5 U.S.C. 3345(a)(2) or (a)(3) would have been unlawful under the court of appeals' decision 1a
Appendix B — Statutory provisions 82a

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 28, 29, 32
Corley v. *United States*, 556 U.S. 303 (2009) 48
Edwards' Lessee v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827) 49
Gross v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) 29
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 30
Hooks v. *Kitsap Tenant Support Servs.*, 816 F.3d 550 (9th Cir. 2016) 43
Lindh v. *Murphy*, 521 U.S. 320 (1997) 29, 32
Marx v. *General Revenue Corp.*, 133 S. Ct. 1166 (2013) 35, 37
NLRB v. *Noel Canning*, 134 S. Ct. 2550 (2014) 24, 49
Norwegian Nitrogen Prods. Co. v. *United States*, 288 U.S. 294 (1933) 49
Roberts v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350 (2012) 26
Ross v. *Blake*, 136 S. Ct. 1850 (2016) 26
Schell's Ex'rs v. *Fauché*, 138 U.S. 562 (1891) 49
United States v. *Alabama Great S. R.R.*, 142 U.S. 615 (1892) 50
United States v. *Hill*, 120 U.S. 169 (1887) 50
Watson v. *United States*, 552 U.S. 74 (2007) 49

Constitution and statutes: Page

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 4
Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 4
Act of Feb. 20, 1863, ch. 45, 12 Stat. 656 4
Act of July 23, 1868, ch. 227, 15 Stat. 168 5
§ 1, 15 Stat. 168 5
§ 2, 15 Stat. 168 5
§ 3, 15 Stat. 168 5
Act of June 22, 1870, ch. 150, 16 Stat. 162 6
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 29
Ch. 153, 28 U.S.C. 2241 *et seq.* 29
Ch. 154, 28 U.S.C. 2261 *et seq.* 29
Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* 2
5 U.S.C. 3345 ..... *passim*
5 U.S.C. 3345-3347 (1994) 5
5 U.S.C. 3345(a) 3
5 U.S.C. 3345(a)(1) ..... *passim*
5 U.S.C. 3345(a)(2) ..... *passim*
5 U.S.C. 3345(a)(3) ..... *passim*
5 U.S.C. 3345(b) 10, 23, 24, 35, 46, 47
5 U.S.C. 3345(b)(1) ..... *passim*
5 U.S.C. 3345(b)(1)(A) 35, 44
5 U.S.C. 3345(b)(1)(A)(i) 35
5 U.S.C. 3345(b)(2) 3, 4, 35, 42, 43
5 U.S.C. 3345(b)(2)(A) 34, 35
5 U.S.C. 3345(c) 30
5 U.S.C. 3345(c)(1) 30
5 U.S.C. 3346 11
5 U.S.C. 3347 (1994) 43

Statutes—Continued: Page

5 U.S.C. 3347(a)(1) 10
5 U.S.C. 3347(b) 10
5 U.S.C. 3348 (1994) 5
5 U.S.C. 3349 ..... 14, 50
5 U.S.C. 3349a 11
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 17
29 U.S.C. 153(d) 17
29 U.S.C. 160(b) 17
29 U.S.C. 160(e) 18
29 U.S.C. 160(f) 18
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 ..... 11, 12
112 Stat. 2681-27 31
112 Stat. 2681-28 31
112 Stat. 2681-29 31
112 Stat. 2681-34 31
112 Stat. 2681-37 31
112 Stat. 2681-45 31
112 Stat. 2681-46 31
112 Stat. 2681-53 31
112 Stat. 2681-54 31
112 Stat. 2681-55 31
112 Stat. 2681-59 31
112 Stat. 2681-64 31
112 Stat. 2681-66 31
112 Stat. 2681-67 31
112 Stat. 2681-68 31
112 Stat. 2681-70 31

Statutes—Continued: Page

112 Stat. 2681-74 31
§ 151, 112 Stat. 2681-611 13
Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 988 5
40 U.S.C. 302(b) 17

Miscellaneous:

George W. Bush, The American Presidency Project, *Personnel Announcement*:
(Apr. 15, 2005), http://www.presidency.ucsb.edu/ws/?pid=81783 54
(Apr. 27, 2006), http://www.presidency.ucsb.edu/6ws/?pid=82393 54
Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 108th Cong., 1st Sess. (2003) 53
Confirmation Hearing on the Nomination of James B. Comey, Jr., of New York, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 108 Cong., 1st Sess. (2003) 52
144 Cong. Rec. (1998):
p. 12,432 ..... 9, 37, 38, 42
p. 12,434 37
p. 22,015 47
pp. 22,508-22,509 7
p. 22,509 8

Miscellaneous—Continued: Page

pp. 22,512-22,513 12
pp. 22,512-22,514 46
p. 22,514 ..... 11, 12
pp. 22,515-22,518 ..... 12, 46
p. 22,519 ..... 12, 47
pp. 22,519-22,520 46
pp. 22,524-22,525 ..... 12, 46
p. 22,526 ..... 12, 46
p. 27,496 ..... 13, 24, 47
p. 27,498 48

147 Cong. Rec. 23,666 (2001) 40

152 Cong. Rec. 9944 (2006) 41

159 Cong. Rec. S17 (daily ed. Jan. 3, 2013) 17

Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) 36

Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (2006) 31

Steven J. Duffield & James C. Ho:

The Illegal Appointment of Bill Lann Lee, Note, 2 Tex. Rev. L. & Pol. 335 (1998) 8

The (Still) Illegal Appointment of Bill Lann Lee, Comment, 3 Tex. Rev. L. & Pol. 403 (1999) 7

Larry M. Eig, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* (2011), https://www.fas.org/sgp/crc/misc/97-589.pdf 27

Gen. Accountability Office:

Homeland Security: DHS's Actions to Recruit and Retain Staff and Comply with the Vacancies Act, http://www.gao.gov/assets/270/264033.pdf (July 2007) 51

Miscellaneous—Continued: Page

Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998 (July 12, 2006), http://www.gao.gov/assets/80/75113.pdf 51

Violation of the 210-Day Limit Imposed by the Vacancies Reform Act (Mar. 18, 2002), http://www.gao.gov/assets/80/75124.pdf 50

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 14, 50

Donald Hirsch, *Drafting Federal Law* (2d ed. 1989) 31

Spencer S. Hsu & Christopher Lee, *Paulison Is Skilled at Disasters*, Washington Post, Sept. 13, 2005 40

David L. Jordan, Note, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, 26 Hastings Const. L.Q. 935 (1999) 8

Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 14, 50

Letter from Victor S. Rezendes, Managing Dir., Strategic Issues, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Dec. 7, 2001), http://www.gao.gov/assets/80/75053.pdf 36

Miscellaneous—Continued: Page

Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998) 6, 7, 8, 51

Office of Mgmt. & Budget, *Statement of Administrative Policy, S. 2176- Federal Vacancies Reform Act of 1998* (Sept. 24, 1998), http://clinton4.nara.gov/OMB/legislative/sap/1998/S2176-s.html 11

Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) 6, 7, 8, 9, 51

Press Release, Office of the Press Secretary, The White House:

Bill Lann Lee Named Acting Assistant AG for Civil Rights (Dec. 15, 1997), 1997 WL 770918 7

President Obama Announces More Key Administration Posts (Sept. 20, 2012), https://www.whitehouse.gov/the-press-office/2012/09/20/president-obama-announces-more-key-administration-posts 54

Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services, 111th Cong., 1st Sess. (2009) 53

Nominations of David W. Ogden, of Virginia; and Robert Raben, of Florida, Each to be Assistant Attorney General for Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) 52

Nominations of the 108th Congress: Hearing Before the Senate Comm. on Environment and Public Works, 108th Cong., 2d Sess. (2004) 53

Miscellaneous—Continued: Page

Nominations to the Department of Transportation, the National Aeronautics and Space Administration, and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 110th Cong., 1st Sess. (2007) 53

Nominations to the U.S. Depatment of Commerce and the Federal Trade Commission: Hearing Before the Senate Comm. on Commerce, Science and Transportation, 112th Cong., 1st Sess. (2011) 53

Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998), https://www.fas.org/sgp/crs/misc/97-589.pdf 6, 7

S. 1761, 105th Cong., 2d Sess. (1998) 9

S. 1764, 105th Cong., 2d Sess. (1998) 9

S. Rep. No. 250, 105th Cong., 2d Sess. (1998) ..... *passim*

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 28, 32

2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* (7th ed. 2014) 29, 32

Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. Times, Sept. 13, 2005 40

In the Supreme Court of the United States

No. 15-1251

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 796 F.3d 67. The decision and order of the National Labor Relations Board (Pet. App. 31a-74a) is reported at 360 N.L.R.B. No. 109. The decision of the administrative law judge (Pet. App. 75a-111a) is available at 2013 WL 4041158.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2015. A petition for rehearing was denied on January 20, 2016 (Pet. App. 112a-115a). The petition for a writ of certiorari was filed on April 6, 2016, and was granted on June 20, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App. B, *infra*, 82a-92a.

STATEMENT

The court of appeals rejected a straightforward reading of the text of the Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, that Presidents of both parties had adopted and applied, without objection by Congress, since passage of the Act. The result of the court of appeals' decision is an upending of the settled understanding of when the President may nominate an official serving in an acting capacity to serve in the same position in a permanent capacity—an understanding reflected in more than 100 presidential nominations and in regular Senate confirmations in the nearly two decades since the Act was passed.

A. Statutory Background

Many of the highest-level offices in the Executive Branch are positions that may be filled only by the President, by and with the advice and consent of the Senate. These positions are often referred to as presidentially appointed, Senate-confirmed, or "PAS" offices.

The FVRA permits three classes of government officials to perform the duties of vacant PAS offices on a temporary basis. The limitations on who may temporarily perform the duties of a vacant PAS office are set out at 5 U.S.C. 3345. The first paragraph of that provision—Subsection (a)(1)—prescribes the general rule: When a PAS office becomes vacant, the "first assistant" to that office "shall perform" the office's functions and duties in an acting capacity. 5 U.S.C.

3345(a)(1). The FVRA then establishes exceptions to that rule of automatic accession by the first assistant.

The next two paragraphs of Subsection (a) set out alternative methods that the President may invoke to designate an acting officer, and thus set out the first two exceptions to the general rule. Paragraph (2) provides that "notwithstanding paragraph (1)," the President may direct a person who already serves in another PAS position to perform the functions and duties of a vacant office. 5 U.S.C. 3345(a)(2). Paragraph (3) provides that "notwithstanding paragraph (1)," the President may direct a person to perform the duties of a vacant office if the person has served in a senior position (defined as a position with a rate of pay equal to the minimum for a GS-15 or higher) in the agency at issue for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(a)(3).

Subsection (b)(1)—the provision at issue in this case—sets out a third exception to the rule in Subsection (a)(1) that the first assistant "shall perform" the functions and duties of the vacant office. Using language that parallels the exceptions in Subsections (a)(2) and (a)(3), it states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he "did not serve in the position of first assistant" or "served in the position of first assistant" for less than 90 days. 5 U.S.C. 3345(b)(1). Subsection (b)(2) then provides that this exception does not apply if "such person is serving as the first assistant to the office of an officer described under subsection (a)," and that first-assistant position is it-

self a PAS office to which the acting officer had been confirmed. 5 U.S.C. 3345(b)(2).

This case concerns whether the first-assistant-focused limitations that Subsection (b)(1) imposes "[n]otwithstanding subsection (a)(1)" apply only to first assistants who automatically assume the functions and duties of the vacant office under Subsection (a)(1), as the Executive Branch has openly maintained, without objection by Congress, since the time of the FVRA's enactment, or whether those limitations also apply to PAS officials and senior agency personnel who are instead directed by the President to perform those functions and duties pursuant to Subsections (a)(2) and (a)(3), as the court of appeals concluded.

1. Appointments practice before enactment of the Federal Vacancies Reform Act of 1998

Since the earliest days of our Nation, Congress has afforded the President substantial latitude to designate government officials to perform the duties of PAS offices on a temporary basis in the event of the sickness, death, incapacity, or resignation of the officeholder. See, *e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 (authorizing President to select "any person," at his discretion, to serve temporarily as Secretary of State, Secretary of the Treasury, or Secretary of War—or as an officer in any of the corresponding departments—in the event of "death, absence from the seat of government, or sickness" of the principal officer); see also Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 ("any person"); Act of Feb. 20, 1863, ch. 45, 12 Stat. 656 (authorizing acting service by any "head of any other Executive Department, or other officer in either of said Departments, whose appointment is vested in the President").

Those early statutes were replaced by the Act of July 23, 1868 (Vacancies Act of 1868 or Vacancies Act), ch. 227, 15 Stat. 168, which governed acting designations for PAS offices until the enactment of the FVRA in 1998. The Vacancies Act of 1868 gave the President substantial discretion to choose a person, from categories of individuals deemed qualified by Congress, to perform the duties of a vacant PAS position on an acting basis. It provided as a default rule that "the first or sole assistant" to the chief of any executive department (or the "deputy" to a bureau chief of any officer of a bureau) "shall * * * perform the duties" of the vacant office. *Id.* §§ 1, 2, 15 Stat. 168. In the alternative, it permitted the President to "authorize and direct the head of any other executive department or other officer" holding a PAS position within an Executive department "to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent shall cease." *Id.* § 3, 15 Stat. 168; see 5 U.S.C. 3345-3347 (1994).

The Vacancies Act imposed time limits on acting designations to ensure that Presidents did not use those designations to circumvent the Senate's advice-and-consent role. When first enacted, the Vacancies Act authorized acting service for only ten days. 15 Stat. 168. But successive statutes expanded the duration of permissible acting service as the processes of nomination and confirmation became more time-consuming, ultimately bringing the period of permissible acting service to 120 days. See Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 988; 5 U.S.C. 3348 (1994).

2. Perceived abuses spur congressional protest

The FVRA was proposed as a response to perceived circumventions of the limitations in the Vacancies Act. In 1973, the Executive Branch made a designation of an acting Director of the Federal Bureau of Investigation that would not have been authorized under the Vacancies Act framework, relying on the legal authority of the enabling act for the Department of Justice (DOJ), Act of June 22, 1870, ch. 150, 16 Stat. 162. See Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 2-3 (1998) (*CRS New Vacancies Act Report)*; Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 4-5 (Jan. 14, 1998) (*CRS Validity Memo)* (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998)) (*Vacancies Act Hearing*). That designation drew swift protest from the Comptroller General, who leads the investigative arm of Congress now known as the Government Accountability Office (GAO). *CRS Validity Memo* 5; *CRS New Vacancies Act Report* 3.

Nevertheless, in subsequent years, over consistent congressional objection, Presidents from both parties invoked similar general authorities in order to designate officials to perform the duties of PAS positions without complying with the Vacancies Act. See *CRS New Vacancies Act Report* 1-4. By the 1990s, in the view of the Congressional Research Service, every department in the Executive Branch had a PAS position the duties of which were being performed by an offi-

cial whose service did not conform to the requirements of the Vacancies Act. *Id.* at 4. Some designees had not occupied positions that would qualify them for acting service under the Vacancies Act. See, *e.g.*, 144 Cong. Rec. 22,508-22,509 (1998) (offering examples). And many designees served for substantially longer than the Vacancies Act authorized. *CRS New Vacancies Act Report* 3-4. Members of Congress protested that those appointments undermined the Senate's constitutional role in the appointment of high-level government officers. See, *e.g.*, *Vacancies Act Hearing* 1-6, 8, 18, 22.

The protests reached a flash-point in 1998, soon after the Senate declined to confirm a particular nominee for the PAS office of Assistant Attorney General for the Civil Rights Division of the DOJ. The Executive Branch responded by bringing the candidate—Bill Lann Lee—from outside the government into the Civil Rights Division as "first assistant" to the vacant Assistant Attorney General position; Lee was then designated to perform the duties of the Assistant Attorney General on an acting basis. *CRS Validity Memo* 2; see Press Release, Office of the Press Secretary, The White House, *Bill Lann Lee Named Acting Assistant AG for Civil Rights* (Dec. 15, 1997), 1997 WL 770918, at *4. The President twice re-nominated Lee to fill the role in a permanent capacity, leaving him in place performing the duties of the office when the Senate declined to confirm him. *CRS Validity Memo* 2.

Several Senators wrote to the Attorney General to question Lee's designation. See Steven J. Duffield & James C. Ho, *The (Still) Illegal Appointment of Bill Lann Lee*, Comment, 3 Tex. Rev. L. & Pol. 403, 405 (1999) (citing letters from Sens. Hatch and Byrd);

Letter from Sen. Thurmond to Attorney General Reno (Jan. 23, 1998) (exhibit to *Vacancies Act Hearing* 125-127). The Congressional Research Service concluded that the designation was unlawful, reasoning that "the allowable 120 [day] period to serve as an acting under the Vacancies Act was exhausted" by Bill Lann Lee's predecessor as an acting official—and that the Vacancies Act clock did not restart with the designation of a new acting official. *CRS Validity Memo* 33.

Others contended that Lee was also ineligible for Vacancies Act service because he had been appointed first assistant to the Assistant Attorney General only *after* that PAS position became vacant. Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, Note, 2 Tex. Rev. L. & Pol. 335, 348-353 (1998) (arguing that the first-assistant provision allows acting service only by an individual who was "first assistant" to the particular PAS officeholder who died, resigned, or became sick or absent); David L. Jordan, Note, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General For Civil Rights*, 26 Hastings Const. L.Q. 935, 938 (1999) (same).

The Department of Justice, for its part, maintained that the designation was valid without regard to the limitations of the Vacancies Act, on the basis of other departmental statutory authorities. See, *e.g.*, *CRS Validity Memo* 33; *Vacancies Act Hearing* 128 (letter from Assistant Attorney General Andrew Fois).

3. The FVRA is proposed to curb perceived circumvention of the Vacancies Act

The FVRA began as an effort to curb what some Members of Congress saw as "disregard of the Vacancies Act." 144 Cong. Rec. at 22,509 (statement of Sen.

Thompson, FVRA's lead sponsor); see, *e.g.*, S. Rep. No. 250, 105th Cong., 2d Sess. 13 (1998) (*Senate Report*); *Vacancies Act Hearing* 1-52.[1]

The bill reported by the Senate Committee maintained the basic framework of the Vacancies Act, but constrained practices that Members of Congress regarded as end-runs around its limitations. The bill retained the general rule that if a PAS officer resigned, died, or became unable to perform the duties of the office, the first assistant shall perform the duties of the PAS office. *Senate Report* 25 (proposed 5 U.S.C. 3345(a)(1)). But it curtailed efforts to "game[]" the Vacancies Act by using last-minute first-assistant designations to make individuals eligible for acting service. 144 Cong. Rec. at 12,432 (statement of Sen. Thompson, on behalf of all bill sponsors). In particular, the bill barred service in an acting capacity by a person who had been nominated to fill a vacant office on a permanent basis, if the nominee had "served in the position of first assistant to" the PAS officer who had resigned, died, or become unable to perform the duties of the office, but had only done so for fewer than 180 days in the 365-day period before the vacancy arose. *Senate Report* 25 (proposed 5 U.S.C. 3345(b)).

---

[1] Members of Congress introduced alternative bills that also sought to ensure that acting designations were made under the terms of the Vacancies Act. S. 1761, 105th Cong., 2d Sess. 1-4 (1998) (sponsored by Sen. Byrd) (seeking to ensure compliance by stripping officials of pay for service not authorized under Vacancies Act); S. 1764, 105th Cong., 2d Sess. 4 (1998) (sponsored by Sen. Thurmond) (seeking to ensure compliance with the Vacancies Act by "further clarify[ing] the intention of Congress to reject" agencies' reliance on more general sources of authority as an independent basis for acting designations and by denying pay to officers who served in violation of the Vacancies Act).

This 180-day time-in-service requirement was intended to be long enough "to prevent manipulation of first assistants to include persons highly unlikely to be career officials." *Id.* at 13. This provision addressed the situation, exemplified by the designation of Bill Lann Lee, in which a person is made first assistant to a PAS position, immediately assumes the duties of that position, and continues to serve after being nominated by the President. See pp. 7-8, *supra*.

The bill left unchanged the President's longstanding authority to direct virtually any PAS official to perform the duties of a vacant PAS office. *Senate Report* 25 (proposed 5 U.S.C. 3345(a)(2)).

To prevent the Executive Branch from making appointments outside of the FVRA, the statute—both as first proposed and as ultimately enacted—specifies that it provides the exclusive means for temporarily filling a vacancy in a PAS office (other than a recess appointment), unless another statute "expressly" authorizes acting designations through a different mechanism. *Senate Report* 26; see 5 U.S.C. 3347(a)(1). The FVRA specifies that a statutory provision "providing general authority to the head of an Executive agency * * * to delegate duties," such as those on which the Executive Branch had been relying, was "*not* a statutory provision" permitting acting designations outside of the FVRA. *Senate Report* 26 (emphasis added); see 5 U.S.C. 3347(b).

4. The White House and Members of Congress insist on changes to give the President more flexibility

As reported by the Senate Committee, the proposed legislation drew objection from the White House and a number of Senators, who maintained that the bill would undermine oversight of the Executive Branch

by providing the President with inadequate flexibility in choosing acting officials. See Office of Mgmt. & Budget, *Statement of Administrative Policy, S. 2176—Federal Vacancies Reform Act of 1998* (Sept. 24, 1998), http://clinton4.nara.gov/OMB/legislative/sap/1998/S2176-s.html (*OMB Statement*); *Senate Report* 31 (additional views of Sens. Glenn, Levin, Lieberman, Cleland and Torricelli); *Senate Report* 35 (minority views of Sens. Durbin and Akaka). A number of Senators asserted that the bill was deficient because it did not give the President the ability to designate to perform the duties of a vacant office on an acting basis "long-time senior civil servant[s] within the agency," who "may be the best qualified to serve as acting officials," 144 Cong. Rec. at 22,514 (floor statement of Sen. Levin); see *Senate Report* 31 (additional views); *Senate Report* 34 (minority views).[2]

Finally, and of special relevance here, some Senators argued that "the length of service requirement for first assistants who are nominated"—*i.e.*, the re-

---

[2] Nor were those the only objections. For example, to account for "the vagaries of the vetting and nomination process," *Senate Report* 13 (proposed 5 U.S.C. 3346), the initial bill extended the period of permissible service for acting officers from the 120 days authorized under the Vacancies Act to 150 days from the date of the vacancy, unless the President nominated someone to fill the position on a permanent basis, *id.* at 25-26. The White House and several Senators maintained that the proposed bill still did not allow for acting service of adequate duration. *OMB Statement* 1; *Senate Report* 34 (minority views). The FVRA as enacted further extended the period for which an official could perform the duties of a vacant PAS office to 210 days, in most cases, with additional tolling of time limits possible when a nomination was pending, and following a presidential transition. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 151, 112 Stat. 2681 (5 U.S.C. 3346, 3349a).

quirement in the reported bill that a first assistant have served as first assistant for 180 days before the vacancy arose in order to serve in an acting capacity after being nominated for a permanent appointment—should be shortened, to "ensure the smooth flow of government activity." *Senate Report* 31 (additional views).

A number of Senators stated that they would not support the FVRA unless the bill was changed to give the President greater flexibility. 144 Cong. Rec. at 22,512-22,513 (Sen. Levin); *id.* at 22,512-22,518 (Sen. Durbin); *id.* at 22,519 (Sen. Glenn); *id.* at 22,524-22,525 (Sen. Lieberman). Without those Senators' support, the bill's proponents were unable to succeed on a cloture vote on the Senate's consideration of the bill. *Id.* at 22,526.

The bill's sponsors then revised the FVRA proposal by making concessions to those who had sought greater flexibility for the President. The revised proposal was added to broader legislation, and enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Omnibus Act), Pub. L. No. 105-277, 112 Stat. 2681. Responding to those who had urged that the pool of permissible acting officers be expanded to include senior agency officials, see 144 Cong. Rec. at 22,514 (statement of Sen. Levin); see also *Senate Report* 31 (additional views); *Senate Report* 34 (minority views), the revised version permitted the President to authorize acting service by an individual who had served in a senior position (defined as a position with a rate of pay equal to the minimum for GS-15 or higher) in the same agency where the vacancy arose, for at least 90 days in the year preceding

the vacancy. Omnibus Act § 151, 112 Stat. 2681-611 (5 U.S.C. 3345(a)(3)).

And responding to those who sought greater flexibility with regard to first-assistant service, the revised legislation adopted the language of Subsection (b)(1), at issue in this case. Senator Thompson, who was the Chairman of the relevant Committee and drafted the revised language, explained that the purpose of the revision was to reduce "the length of service prior to the onset of the vacancy that the first assistant must satisfy to be eligible to serve as the acting officer" pursuant to Subsection (a)(1) from 180 days to 90 days, if the first assistant was also nominated to fill the position on a permanent basis. 144 Cong. Rec. at 27,496. Senator Thompson expressly noted that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" *Ibid.* (emphasis added).

5. Beginning immediately after its enactment, Subsection (b)(1) is construed to limit only first assistants

From the enactment of the FVRA until the court of appeals' decision here, Presidents of both parties have made acting designations and nominations without congressional objection on the understanding that Subsection (b)(1) constrains acting service only by first assistants pursuant to Subsection (a)(1) of 5 U.S.C. 3345, and not by officials designated by the President pursuant to Subsection (a)(2) or (a)(3). There have been more than 100 such nominees in the 18-year history of the FVRA, see App. A, *infra*, 1a-81a. And nominees

serving on the basis of the Executive's longstanding interpretation have been routinely confirmed by the Senate.

a. The Executive's interpretation was first articulated five months after the FVRA's enactment by the Office of Legal Counsel (OLC) in the Department of Justice. Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999). As noted, Subsection (b)(1) is set out as a limitation applicable "[n]otwithstanding subsection (a)(1)," which sets forth the general rule that the first assistant performs the functions and duties of a vacant PAS office. In view of that cross-reference, OLC interpreted Subsection (b)(1) as a limitation that "applies only to persons who serve as acting officers by virtue of having been the first assistant to the office"—*i.e.* only to persons who automatically assume acting status based on the general rule in Subsection (a)(1). *Id.* at 64. Thus, OLC concluded, the restriction in Subsection (b)(1) does not apply to a person already serving in another PAS office who is directed by the President to perform the duties of a vacant office under Subsection (a)(2), or to an official with at least 90 days service in a senior position in the same agency who is directed by the President to perform the duties of the vacant PAS office under Subsection (a)(3). *Ibid.*

The GAO, an instrumentality of Congress that plays a congressionally assigned role in the FVRA's enforcement, see 5 U.S.C. 3349, has likewise construed the requirements of Subsection (b)(1) as applicable only to first assistants who serve as acting officials under Subsection (a)(1). See Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental

Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

b. Every President since the FVRA's enactment has made nominations of persons serving in an acting capacity under Subsections (a)(2) and (a)(3) in accordance with that construction.

For instance, within a year of the FVRA's enactment, President Clinton nominated David Ogden to fill the office of Assistant Attorney General for the Civil Division on a permanent basis. Ogden already was serving as Acting Assistant Attorney General for the Civil Division pursuant to Subsection (a)(3) based on his position as a senior official for at least 90 days elsewhere in the Department. He continued serving in that acting capacity while his nomination was pending, consistent with the OLC guidance, even though he had not been first assistant for 90 days in the year prior to the vacancy. After approximately 18 months of service in an acting capacity while his nomination was pending, Ogden was confirmed by the Senate in December 2000. See App. A, *infra*, 2a.

President Clinton also nominated and the Senate confirmed a number of other individuals who served as acting officials pursuant to Subsections (a)(2) and (a)(3) while their nominations were pending, including a Deputy Director of Central Intelligence, App. A, *infra*, 7a; a Deputy Secretary of Labor, *id.* at 2a; an Under Secretary of State, *id.* at 3a; and other high-level officials at multiple government departments. See *id.* at 2a-10a.

President George W. Bush relied on the same interpretation in making nominations of acting officials to fill various high-level posts across multiple departments—including numerous nominations that the Senate confirmed. See App. A, *infra*, 11a-60a. For example, officials who continued to serve in an acting capacity pursuant to Subsection (a)(2) or (a)(3) following nomination, and who were confirmed by the Senate, include Deputy Attorney General James Comey, *id.* at 19a, as well as officials in posts such as Commissioner of the Food and Drug Administration, *id.* at 30a; Secretary of the Air Force, *id.* at 55a; Director of the National Science Foundation, *id.* at 20a; President of the Export-Import Bank, *id.* at 27a; the head of the Federal Emergency Management Agency, *id.* at 28a; and Administrator of the U.S. Agency for International Development, *id.* at 43a.

That practice has continued to the present day. A number of high-level officials were nominated by President Obama and confirmed to PAS offices whose functions and duties they performed temporarily pursuant to Subsection (a)(2) or (a)(3) during the pendency of their nominations. Such officials included Deputy Attorney General Sally Q. Yates, App. A, *infra*, 75a; Deputy Secretary of Commerce Rebecca M. Blank, *id.* at 64a; Deputy Secretary of Transportation Victor M. Mendez, *id.* at 69a; and Deputy Secretary of Education James H. Shelton, III, *id.* at 68a, among numerous others, *id.* at 60a-81a.[3]

---

[3] The petition for a writ of certiorari listed a number of agencies at which high-level decisions "could be open to question under the court of appeals' reasoning" concerning the FVRA. Pet. 27. This Office has subsequently learned that one of the agencies so identified, the General Services Administration (GSA), should have been

B. Proceedings In This Case

1. a. The National Labor Relations Board (NLRB or Board) is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Its General Counsel is required by statute to be appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(d). The General Counsel has "final authority * * * in respect of" the issuance of complaints alleging that a person has committed an unfair labor practice. *Ibid.*; see 29 U.S.C. 160(b).

In June 2010, after the NLRB's General Counsel resigned, the President directed senior career NLRB official Lafe Solomon to serve temporarily as the Board's Acting General Counsel. Pet. App. 5a. Solomon satisfied the requirements for acting service under 5 U.S.C. 3345(a)(3) because he had served as the Director of the NLRB's Office of Representation Appeals, a senior position with a rate of pay equal to or greater than GS-15, for at least 90 days in the year preceding the vacancy. In fact, he had been in that position for the previous ten years. Pet. App. 11a.

In January 2011, the President nominated Solomon to serve as NLRB General Counsel on a permanent basis. Pet. App. 11a. Solomon's nomination was not acted upon during the 112th Congress, so it was returned to the President at the expiration of that Congress in accordance with Senate rules. 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination in May 2013, but later with-

---

omitted because the relevant official at GSA (the acting Administrator) was designated as acting pursuant to a GSA-specific provision, 40 U.S.C. 302(b).

drew it and put forward Richard Griffin, who was later confirmed. Pet. App. 6a.

b. In January 2013, while Solomon was performing the duties of the NLRB General Counsel on an acting basis, a Regional Director acting on the General Counsel's behalf issued a complaint alleging that respondent had committed an unfair labor practice. Pet. App. 7a. An administrative law judge (ALJ) determined that respondent had committed an unfair labor practice, and the NLRB agreed, adopting the recommended order of the ALJ with minor modifications. *Ibid.*

2. Respondent filed a petition for review in the United States Court of Appeals for the D.C. Circuit, and the NLRB filed a cross-petition for enforcement of its order. Pet. App. 7a; see 29 U.S.C. 160(e) and (f). Respondent argued that the complaint alleging an unfair labor practice had been unauthorized, because Solomon could not legally perform the duties of General Counsel after being nominated to fill that position permanently. Pet. App. 7a, 11a.

The court of appeals granted respondent's petition for review and vacated the Board's order. Pet. App. 1a-30a. Rejecting the Executive Branch's longstanding interpretation, the court concluded that the precondition in Subsection (b)(1) that a nominee must have been the first assistant to an office for 90 days during the year preceding the vacancy in order to serve temporarily in that office in an acting capacity applies not only to first assistants serving under Subsection (a)(1), but also to persons already serving in a PAS office in the Executive Branch who are directed by the President to perform the duties of a vacant PAS position under Subsection (a)(2), and to senior agency officials directed by the President to perform

the duties of a vacant PAS office in their agency under Subsection (a)(3). *Id.* at 20a.

The court of appeals believed that its conclusion was largely dictated by the FVRA's text, particularly the part of Subsection (b)(1) referring to a "person" serving as an acting official "under this section," which it surmised indicated that Subsection (b)(1) reached "the full spectrum of possible candidates for acting officer" under Section 3345. Pet. App. 12a (emphasis and citation omitted). The court rejected the government's argument that Subsection (b)(1)'s specification that it applies "[n]otwithstanding subsection (a)(1)" means that the subsection constrains only acting service by first assistants pursuant to Subsection (a)(1). *Id.* at 13a; see *id.* at 13a-15a. The court also disagreed that the statute's legislative history and purpose countermanded its reading of the text. *Id.* at 17a-20a.

Because "Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court of appeals concluded that "the FVRA prohibited [Solomon] from serving as Acting General Counsel from that date forward." Pet. App. 20a. It therefore concluded that Solomon was not properly serving as Acting General Counsel when the unfair labor practice complaint was issued against respondent. The court also found that neither harmless-error principles nor the de facto officer doctrine rendered the unfair labor practice complaint valid regardless of whether Solomon's appointment violated the FVRA. *Id.* at 20a-30a.[4]

---

[4] The court of appeals treated as waived any argument that even if Solomon's service as Acting General Counsel was prohibited while Solomon's nomination was pending, the unfair labor practice complaint here was validly issued because Solomon's acting service

3. The court of appeals denied rehearing en banc by a vote of 7-3, over the dissenting votes of Judges Brown, Kavanaugh, and Millett. Pet. App. 114a-115a.

SUMMARY OF ARGUMENT

The FVRA bars certain persons from performing on an acting basis the functions and duties of a vacant office for which Senate confirmation is required, if they are nominated to fill the same vacant position on a permanent basis, unless the person has previously served as the first assistant to the vacant office for at least 90 days. 5 U.S.C. 3345(b)(1). Beginning almost immediately after the FVRA's enactment, the Executive Branch has consistently interpreted this restriction to apply only to first assistants who automatically assume responsibility for performing the duties of the vacant office on a temporary basis, not other officials who are directed by the President to do so in lieu of the first assistant. Presidents of both parties have combined to make more than 100 nominations and designations premised on that understanding. The congressional instrumentality with a role in overseeing FVRA administration has agreed with that construction, and the Senate has routinely confirmed nominees put forward under this view of the statute—without any apparent objection before the decision below. The court of appeals erred in setting aside this longstanding interpretation of the FVRA, both because that interpretation accords with the statute's text, structure, and objectives, and because the settled practice of the Executive and Congress in applying a statute concern-

---

was again legitimate in the period between when Solomon's nomination was returned and when it was resubmitted. Pet. App. 7a n.3.

ing allocation of power between those two Branches is entitled to great weight.

A. The Executive's longstanding reading of the FVRA best accords with its text and structure. The FVRA, in 5 U.S.C. 3345, sets out three separate mechanisms by which an official may perform the duties of a vacant PAS office. Subsection (a)(1) establishes the general rule that the first assistant to a vacant office automatically shall assume the responsibility for performing the duties of that office on a temporary basis. Subsection (a)(2) then establishes an exception to that otherwise categorical rule, providing that "notwithstanding paragraph (1)," the President instead may direct a person who already occupies a PAS office in the Executive Branch to perform the duties of the vacant office. And Subsection (a)(3) establishes another such exception, providing, again "notwithstanding paragraph (1)," that the President may direct another high-level official in the same agency to perform the duties of the vacant office.

Subsection (b)(1) then provides that "[n]otwithstanding subsection (a)(1)," a person may not serve in an acting capacity after being nominated to fill the office on a permanent basis, unless the person served as first assistant for 90 days before the vacancy arose. Congress's directive that the limits of Subsection (b)(1) take precedence over only one of three statutory mechanisms for acting service—the mechanism for service by a first assistant under Subsection (a)(1)—strongly suggests that Congress did not intend those limits to take precedence over the mechanisms for acting service by other officials that are set forth in Subsections (a)(2) and (a)(3). Thus, Subsection (b)(1), like Subsections (a)(2) and (a)(3), creates an exception to the rule

that the first assistant shall automatically accede to the responsibility for performing the duties of the vacant office. It does so by preventing such service if the first assistant is nominated to fill the position on a permanent basis, unless the official served as first assistant for 90 out of the 365 days prior to the occurrence of the vacancy.

This reading accords with the broader structure of the statute. It sensibly reads a restriction tied to first-assistant status and length of service as first assistant to pertain only to officials who are themselves first assistants. It ensures that all of the "notwithstanding" clauses in Section 3345 are read consistently with each other, as carving out an exception to the default rule that the first assistant shall perform the duties of the vacant office. And it is not countermanded by any of the other statutory language.

B. The Executive's longstanding interpretation also best accords with the FVRA's objectives. The FVRA was enacted in response to both perceptions that the Executive Branch had been circumventing the preexisting Vacancies Act framework (including through last-minute first-assistant appointments) and perceptions that the category-of-service restrictions in the preexisting framework afforded Presidents too little flexibility. The statute as enacted addressed both concerns. It expanded the categories of persons the President could direct to serve in an acting capacity. And it curbed the President's ability to manipulate the categories of officials eligible to perform acting service, by barring recently appointed first assistants from serving as both acting officers and nominees to fill the office on a permanent basis in cases where the first assistants were not themselves Senate-confirmed.

The court of appeals' interpretation of Subsection (b)(1) would disserve the FVRA's objectives. It would undermine the statute's goal of enabling service by the career officials that Members of Congress had described as especially qualified—by preventing such individuals from serving if the President also regarded them as most qualified to occupy the PAS position at issue on a permanent basis.

The court of appeals' interpretation likewise would not advance the statute's goal of preventing the Executive Branch from manipulating the categories of service authorized under the FVRA. That is because the FVRA already contains corresponding safeguards against manipulation for individuals other than the first assistants whose service is authorized pursuant to Subsection (a)(1). In particular, individuals designated under Subsection (a)(2), by necessity, *already* serve in an office that requires Senate confirmation. And senior agency officials designated under Subsection (a)(3), by necessity, have *already* served in a senior position at the relevant agency for at least 90 of the 365 days preceding the vacancy, satisfying the same length-of-service requirement that Congress imposed on first assistants under Subsection (b)(1) in order to avoid manipulation of the FVRA's categories of service. Congress thus had no reason to subject non-first-assistants directed by the President to perform the duties of the vacant office to the first-assistant-based restrictions in Subsection (b)(1).

C. The Executive's interpretation also best accords with the FVRA's legislative history. There is no dispute that in the version of the FVRA reported by the Senate Committee, Subsection (b)'s restriction applied only to first assistants. That version of the FVRA

could not survive a cloture vote, however, because a number of Senators thought that in a number of respects it gave the President too *little* flexibility in designating acting officials. That version was then revised to enlarge the pool of individuals eligible to be the acting official and to reduce the length of the time-in-service requirement for first assistants. It was in the process of making that change that the relevant text of Subsection (b) was adopted. This context weighs strongly against reading the change to the language of Subsection (b)(1) as a change that substantially restricted the Executive's designation authority, by stripping the President of longstanding power to designate officials already in PAS posts to perform the duties of vacant PAS positions on an acting basis. Tellingly, the Senator who authored the amended language (the Chairman of the Committee and the FVRA's chief sponsor) explained that by virtue of the "[n]otwithstanding subsection (a)(1)" language in Subsection (b)(1), the restriction contained in Subsection (b)(1) would apply only to first assistants who perform the duties of a vacant office under Subsection (a)(1), and specifically not to other officials who do so pursuant to Subsections (a)(2) and (a)(3). 144. Cong. Rec. at 27,496 (statement of Sen. Thompson).

D. The consistent manner in which the FVRA has been interpreted and applied since its enactment reinforces the plain text. Just two Terms ago, this Court emphasized that historical practice is entitled to significant weight in construing constitutional provisions that address the allocation of power between the President and Congress in filling vacant offices in the Executive Branch. *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Consideration of practice is even

more appropriate in construing a statute such as the FVRA that addresses that division of authority. The Senate may decline to confirm a nominee it believes is serving unlawfully, and Congress has both the incentive and ability to quickly correct by subsequent legislation any perceived encroachment on the allocation of powers that it intended the statute to accomplish.

The historical practice here strongly supports the Executive's interpretation. Soon after the FVRA's enactment, the Executive Branch set forth its understanding of Subsection (b)(1) in written guidance by OLC. The GAO, a congressional instrumentality with a statutory role in overseeing FVRA compliance, subsequently agreed with that position. And every President since the enactment of the FVRA has made personnel decisions in accordance with the Executive's view, through the designations and nominations of more than 100 high-ranking officials whose service would have been invalid under the court of appeals' interpretation. Insofar as we are aware, no Member of Congress has ever objected to such designations and nominations prior to the decision in this case. Indeed, the Senate has routinely confirmed acting officials whose simultaneous service as nominee and acting official would have been unlawful if the court of appeals' interpretation were correct. Particularly in the context of legislation designed to protect the Senate's institutional prerogatives vis-à-vis the President, the actions of the two Branches provide compelling support for the Executive's longstanding interpretation.

ARGUMENT

The court of appeals erred in setting aside the interpretation of the FVRA on which every President has acted, without objection from Congress, since the

enactment of the statute. The text, structure, purpose, and history of the statute each supports the Executive's understanding that Subsection (b)(1) of Section 3345 sets forth limits applicable only to first assistants who are serving pursuant to Subsection (a)(1)—and not to PAS officials serving pursuant to Subsection (a)(2) or senior agency officials serving pursuant to Subsection (a)(3). And the manner in which the FVRA has been understood and applied by the Executive, without objection by the Senate in considering the nominations of numerous officials serving in an acting capacity under Subsections (a)(2) and (a)(3), confirms the soundness of this understanding.

A. The Manner In Which The FVRA Has Been Understood Since Its Enactment Represents The Best Reading Of The FVRA's Text And Structure

This Court's interpretation of a federal statute "begins with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), mindful that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012). Here, the text of Subsection (b)(1) demonstrates that the limitation contained in that provision sets a limit on acting service only by first assistants pursuant to Subsection (a)(1) of Section 3345, and does not constrain acting service of PAS officials and senior agency officials pursuant to Subsections (a)(2) and (a)(3).

1. The FVRA authorizes three classes of officials to temporarily perform the functions and duties of a vacant PAS office under 5 U.S.C. 3345. Subsection (a)(1) first provides, as a general rule, that a first assistant "shall perform" the functions and duties of a vacant PAS office temporarily, subject to time limits

specified elsewhere in the Act. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) then provide two exceptions to that general rule. Subsection (a)(2) provides that, "notwithstanding paragraph (1)," the President (and only the President) may designate an individual who is already serving in another PAS office in the Executive Branch to perform the duties of a vacant office on a temporary basis. 5 U.S.C. 3345(a)(2). And Subsection (a)(3) provides that, "notwithstanding paragraph (1)," the President (and only the President) may designate an official in the agency where the vacancy has occurred, if that official holds a sufficiently senior post and has served in that senior post for at least 90 days. 5 U.S.C. 3345(a)(3).

Subsection (b)(1), which immediately follows the three provisions authorizing acting service, creates another exception to the otherwise categorical rule that the first assistant shall perform the duties of the vacant office. Subsection (b)(1) specifies that, "[n]otwithstanding subsection (a)(1)," a person who is nominated to fill a vacant PAS office on a permanent basis may not perform the functions and duties of that office in an acting capacity if he was not the office's first assistant for at least 90 days during the year preceding the vacancy. 5 U.S.C. 3345(b)(1). "Notwithstanding" clauses are commonly used when different statutes or statutory provisions contain directives that contradict each other, with Congress providing that one statute "is to apply 'notwithstanding' the provisions of another, specified statute or class of statutes," in order to dictate which contradictory provision is to prevail. Larry M. Eig, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* 37 (2011). As the court of appeals put it, these

"notwithstanding" clauses set out an "order of operations" among conflicting provisions. Pet. App. 14a.

Here, Congress's decision to specify that the limits in Subsection (b)(1) apply only "[n]otwithstanding subsection (a)(1)" strongly indicates that Congress intended the first-assistant limitation in Subsection (b)(1) to override only the directive of automatic service by the first assistant contained in Subsection (a)(1). That is the function performed by the clause "notwithstanding paragraph (1)" in Subsections (a)(2) and (a)(3). If Congress had instead meant to subject all three mechanisms for identifying an acting official to Subsection (b)(1)'s requirement of 90 days of prior service as the first assistant, in order for the acting official to continue serving after being nominated to fill the position on a permanent basis, it could have straightforwardly provided that the limitation applies "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," or simply "[n]otwithstanding subsection (a)," which contains all three mechanisms. What Congress would *not* do if it wished to limit acting service under all three statutory subsections is direct that the limitations apply "[n]otwithstanding" only *one* of the them—"subsection (a)(1)."

The circumstances surrounding the enactment of the "notwithstanding" clause here make this conclusion particularly appropriate. Negative inferences that the expression of one item is intended to signal the exclusion of another are appropriate when the included and omitted items are both "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citation omitted); see Antonin Scalia and Bryan A. Garner, *Reading Law: The In-*

terpretation of Legal Texts 107-111 (2012) (Scalia & Garner) (discussing negative-implication canon); 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47.23 (7th ed. 2014) (Singer) (same). And the "negative implications raised" when a statutory rule is made expressly applicable to only one provision are strongest when all the relevant provisions were "being considered simultaneously when the language raising the implication was inserted." *Lindh* v. *Murphy*, 521 U.S. 320, 329-330 (1997); see *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (same).

Applying these principles in *Lindh*, this Court held that when the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, set forth rules in Chapters 153 and 154 of Title 28 of the United States Code, and then provided that "'Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act,'" the logical inference from Congress's words was that the amended Chapter 153 should *not* apply to cases already pending when the statute was enacted. 521 U.S. at 327 (citation omitted). It made little sense to imagine that Congress would have expressly mentioned only one chapter if it wanted both to apply in pending cases. *Ibid.* The same conclusion is called for here. Subsections (a)(1), (a)(2), and (a)(3) constitute an "associated group or series" immediately preceding Subsection (b)(1) in the statute. *Barnhart*, 537 U.S. at 168 (citation omitted). And Congress would have had every reason to have all three subsections providing for acting service "in mind," *Lindh*, 521 U.S. at 330, when it considered the "[n]otwithstanding subsection (a)(1)" limitation in Subsection (b)(1), because all three subsections providing for acting service and the limitation

in Subsection (b)(1) were considered and enacted by Congress at the same time.

Adjoining provisions in Section 3345 bolster this construction of Subsection (b)(1), particularly when read against the background principle that "identical words used in different parts of the same act" ordinarily "are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (citation omitted). Congress twice used the phrase "notwithstanding paragraph (1)" in Subsection (a), immediately preceding the parallel limiting clause in Subsection (b)(1). In each of those provisions, the clause makes clear that the provision overrides the rule of automatic accession by the first assistant in Subsection (a)(1)—thereby constraining operation of Subsection (a)(1) alone. 5 U.S.C. 3345(a)(2) and (3). Congress likewise used the "[n]otwithstanding subsection (a)(1)" formulation in Subsection (c) of 5 U.S.C. 3345 to override only the rule of automatic accession by the first assistant in Subsection (a)(1). Specifically, Congress provided in Subsection (c) that, "[n]otwithstanding subsection (a)(1)," the President may direct a person who is nominated by the President for reappointment to an additional term in the same office to continue to serve in that office until the Senate acts on the nomination. 5 U.S.C. 3345(c)(1). The Executive's interpretation of Subsection (b)(1) gives the same meaning and function to the directly parallel "notwithstanding" clauses referring solely to Subsection (a)(1) in each of the four relevant subsections in which that phrase appears.

This understanding of Subsection (b)(1) is further strengthened by the contrast between the narrow "[n]otwithstanding subsection (a)(1)" clause that Congress enacted as part of the FVRA and the much

broader "notwithstanding" clauses that Congress routinely utilizes—including in the public law in which the FVRA was enacted. Congress "frequently use[s]" the phrase "notwithstanding any other provision of law" to give a provision broad scope. Donald Hirsch, *Drafting Federal Law* 110 n.36 (2d ed. 1989); see Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* 256 (2006) (acknowledging practice but recommending that drafters instead specify the precise provisions they intend to override). For instance, as part of the statute that enacted the FVRA, Congress specified in approximately 200 places that particular provisions were to apply "notwithstanding any other provision of law." See, *e.g.*, Omnibus Act, 112 Stat. 2681-27, 2681-28, 2681-29, 2681-34, 2681-37, 2681-45, 2681-46, 2681-53, 2681-54, 2681-55, 2681-59, 2681-64, 2681-66, 2681-67, 2681-68, 2681-70, 2681-74. Congress's choice to depart from that common formulation here, in a situation where use of such a formulation would have achieved respondent's reading of the statute, lends additional weight to the longstanding interpretation of the "notwithstanding" clause.

2. The court of appeals offered no persuasive reason why a Congress that sought to override Subsections (a)(1), (a)(2), and (a)(3), would have done so through a limitation made applicable "[n]otwithstanding subsection (a)(1)" alone. Nor did it identify textual features that justify setting aside the natural inference from the narrower "notwithstanding" language that Congress enacted. And the reasons that the court of appeals did posit are unpersuasive.

The court of appeals first suggested that the Executive's longstanding interpretation of Subsection (b)(1) is incorrect because the "ordinary, contemporary,

common meaning" of "notwithstanding," is "in spite of." Pet. App. 13a (citations omitted). But the Executive's longstanding interpretation is fully consistent with that meaning. It treats the "notwithstanding" clause as setting forth an order of operations in which Subsection (b)(1) applies "in spite of" Subsection (a)(1). And as this Court has explained, when a statute specifies that a command does control in one circumstance, it is appropriate to infer that the command does not control in other, unmentioned circumstances—so long as it is appropriate, as it plainly is here, to infer that Congress would have had each of the circumstances in mind when specifying the scope of the statutory command. See, *e.g.*, *Lindh*, 521 U.S. at 329-330; *Barnhart*, 537 U.S. at 168; Singer § 47.23; Scalia & Garner at 107-111.

The court of appeals also hypothesized that Congress "likely" specified that Subsection (b)(1) applies "[n]otwithstanding" only Subsection (a)(1), which directs acting service by first assistants, because that subsection uses the mandatory "shall," whereas Subsections (a)(2) and (a)(3) do not. Pet. App. 13a-14a. But that is no explanation. The word "shall" in Subsection (a)(1) is what makes the general rule of accession by the first assistant mandatory and automatic in the first place. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) use the word "may" rather than "shall" because their operation is not automatic, but rather is conditioned on the President's choosing to invoke them. Once the President does so, however, those subsections are just as categorical as Subsection (a)(1) in directing the specified official to perform the office's functions and duties—an acting official assumes the same duties whether serving under Subsection

(a)(1), (a)(2), or (a)(3). If Congress had wanted to override the acting-service provisions in Subsections (a)(2) and (a)(3), by imposing the rule of 90 days of prior service as first assistant on nominees who did not even assume an acting capacity on a first-assistant basis, Congress surely would have needed to direct that Subsection (b)(1)'s rule applies "notwithstanding" those provisions, not just "[n]otwithstanding subsection (a)(1)."

The court of appeals also relied on other features of the statutory text, but each of those textual features is fully consistent with the longstanding interpretation of the FVRA applied by the Executive without objection from Congress. The court suggested that Subsection (b)(1) must constrain acting service under all three paragraphs in Subsection (a) because Subsection (b)(1)'s reference to limits on a "person" serving under "this section" (rather than a "first assistant" serving under "Subsection (a)(1)") is "irreconcilable" with the Executive's interpretation. Pet. App. 14a. There is no conflict. The first assistants described in Subsection (a)(1) to whom Subsection (b)(1) applies are, of course, "person[s]" who are serving under "this section," 5 U.S.C. 3345. Moreover, Subsection (b)(1) already indicates that it limits only first assistants serving under Subsection (a)(1)—by specifying that it applies "[n]otwithstanding subsection (a)(1)" rather than "[n]otwithstanding subsection (a)" or "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," and by specifying a precondition that would very rarely be satisfied by a person not serving as first assistant. There thus was no need for Congress to reiterate, using the court's preferred formulation, see Pet. App. 12a-13a, that the

affected persons were only those who are first assistants serving under Subsection (a)(1).

Indeed, Congress indisputably spoke of "person[s]" serving under the FVRA even when the universe of persons it was discussing consisted only of first assistants. It did so in the very next paragraph, when it declared that Subsection (b)(1) "shall not apply to any *person*" who meets specified statutory criteria that include current service as a "first assistant." 5 U.S.C. 3345(b)(2)(A) (emphasis added). As this provision demonstrates, there is no conflict between Congress's decision setting forth a rule in Subsection (b)(1) that applies only to first assistants, and Congress's use of the word "person."

The FVRA's evolution during the legislative process further demonstrates that Congress's use of "person" and "under this section" is fully consistent with the Executive's interpretation of Subsection (b)(1). The version of the FVRA that was reported by the Senate Committee contained a restriction on simultaneous nomination and acting service that, as the court of appeals acknowledged, "manifestly applies to first assistants only." Pet. App. 19a. Yet that version was the original source of the words "person" and "under this section" in what eventually became Subsection (b)(1). See *Senate Report* 25. Because those terms were simply carried over into the final version of the FVRA from a provision that unambiguously applied only to first assistants, it would be particularly inappropriate to infer that those terms reflected a congressional intent to apply Subsection (b)(1) beyond first assistants.

The court of appeals also doubly erred in suggesting that the Executive's interpretation—but not the

court's—would render other provisions of Section 3345 superfluous. Pet. App. 15a. The court reasoned that if Subsection (b)(1) were limited to first assistants, it would be superfluous for Subsection (b)(2) expressly to state that it applies only to a person who "is serving" as first assistant. *Id.* at 16a; see 5 U.S.C. 3345(b)(2)(A). But Subsection (b)(1) imposes a restriction based on brevity of *past* service as first assistant in the period "preceding" the vacancy, 5 U.S.C. 3345(b)(1)(A), while Subsection (b)(2) creates an exception to that restriction based on *current* service as a *Senate-confirmed* first assistant, 5 U.S.C. 3345(b)(2)(A). Given that contrast, it is entirely understandable that Congress would state with completeness the criteria for application of Subsection (b)(2), and clarify that it applies only to current, Senate-confirmed first assistants. Indeed, that structure makes the restriction in Subsection (b) as a whole (including the exception to that restriction in paragraph (2)) clear by making it entirely self-contained in its treatment of first assistants serving in an acting capacity who are also nominees. The canon against superfluity is therefore inapplicable. See *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1176 (2013) (recognizing that statutory provisions are not superfluous when they add clarity).

The court of appeals also posited that the Executive's interpretation *could* create superfluity with regard to Subsection (b)(1)(A)(i), which triggers Subsection (b)(1)'s prohibition on a nominee performing the functions and duties of the vacant PAS office if the nominee "did not serve in the position of first assistant" at all in the year preceding the vacancy. Pet. App. 16a. It observed that "if subsection (a)(1) refers

to the first assistant at the time of the vacancy, then the condition in subsection (b)(1)(A)(i)—that the person 'did not serve in the position of first assistant to the office' in the prior 365 days—is inoperative because the current first assistant *necessarily* served as the first assistant in the previous year." *Ibid.* The court acknowledged, however, that Subsection (b)(1)(A)(i) is not superfluous if Subsection (a)(1) authorizes service by individuals who became the first assistant after the vacancy arose. *Ibid.*

As both OLC and GAO have concluded, that is the correct reading of Subsection (a)(1). Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001); Letter from Victor S. Rezendes, Managing Dir., Strategic Issues, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Dec. 7, 2001), http://www.gao.gov/assets/80/75053.pdf. Because Subsection (a)(1) authorizes acting service by any person who serves as "the first assistant *to the office of*" the officer who resigned, 5 U.S.C. 3345(a)(1) (emphasis added), the provision by its terms allows acting service by an individual who is named first assistant to a particular PAS office even if the office is already vacant when he is named and there is no "officer" in the position. A contrary interpretation would "render[] the words 'to the office' meaningless"—a result that would be "particularly troublesome given that the [FVRA] specifically modified the old Vacancies Act by replacing the phrase 'to the officer' with the phrase 'to the office.'" 25 Op. O.L.C. at 180.

In any event, the court of appeals also erred in invoking the canon against superfluities because its own interpretation of the FVRA creates superfluities. The

court's interpretation of the "[n]otwithstanding subsection (a)(1)" clause not only fails to accord that language its natural meaning, but also renders that specific language superfluous. At a minimum, that shows that the court erred in believing that the canon against superfluities counsels against adhering to the understanding of the FVRA that has prevailed since the statute was enacted. See *Marx*, 133 S. Ct. at 1177 ("[T]he canon against surplusage assists only where a competing interpretation gives effect to every clause and word of a statute.") (citation and internal quotation marks omitted). Ultimately, when the "[n]otwithstanding" clause of Subsection (b)(1) is given its natural reading, and is considered in context, the Executive's interpretation of the statute is on by far the firmest textual ground.

B. While The Settled Construction Of The FVRA Accords With The Statute's Design, The Court Of Appeals' Reading Creates Anomalies

The longstanding construction of Subsection (b)(1) is also superior to respondent's construction as a matter of statutory design, because it furthers the FVRA's recognized objectives, while the court of appeals' reading creates anomalies and asymmetries.

1. The FVRA was enacted following appointment controversies in which a number of Senators expressed the view that Presidents were circumventing the framework for designating officials set out in the Vacancies Act. See, *e.g.*, 144 Cong. Rec. at 12,432 (statement of Sen. Thompson); *id.* at 12,434 (statement of Sen. Thurmond). Presidents of both parties had invoked agencies' general statutory authorities to make designations without regard to the Vacancies Act's time limits and qualifications for acting service, draw-

ing widespread protest. See pp. 6-8, *supra*. And the then-current Administration had drawn particular ire by installing Bill Lann Lee into acting service when he had been named a "first assistant" only after the vacancy in the PAS position arose—a maneuver that was widely criticized as an evasion of the Vacancies Act's qualifications for service. See pp. 7-8, *supra*. At the same time, however, the Executive Branch and a number of Senators argued that the initial proposal to end these types of designations was too inflexible in its time limitations and category-of-service restrictions.

The FVRA was enacted the year following that controversy. It balanced the objective of preventing perceived circumvention of Vacancies Act requirements with the goal of ensuring effective execution of high-level government offices during vacancies. Thus, responding to the practices that had been criticized as circumventions of the Vacancies Act, the FVRA prohibits the use of general agency authorities as a basis for acting designations outside the FVRA. And it curtails Presidents' ability to elevate their chosen nominees to PAS positions on an acting basis through designations as first assistants occurring only after (or soon before) the PAS vacancy arose—thereby cutting off an avenue for "manipulat[ing]," *Senate Report* 13, or "gam[ing]," 144 Cong. Rec. at 12,432 (statement of Sen. Thompson on behalf of sponsors), the FVRA's restrictions on categories of individuals qualified to serve. At the same time, however, the FVRA as enacted expands the categories of those authorized to serve beyond those who would have been permitted under the pre-existing Vacancies Act and the bill reported by the Senate Committee. It authorizes act-

ing service by senior agency officials, who a number of Senators had suggested were actually best qualified to lead an agency in transition. And it extends the duration of permissible acting service from the periods allowed under the Vacancies Act and under the FVRA as initially proposed.

2. While the Executive's longstanding construction of Subsection (b)(1) interprets the statute in a manner consistent with the objectives of the Congress that enacted it, the court of appeals' reading would introduce anomalies that would undermine the statute's design.

a. The court of appeals' reading would substantially undercut the FVRA's objective of providing the President with a measure of added flexibility in acting designations. The court's reading would have a particularly implausible effect on PAS officials who serve in an acting capacity in vacant PAS positions pursuant to a directive by the President under Subsection (a)(2). The court would read Subsection (b)(1) to have *rescinded* the President's longstanding authority to designate such officials to serve in an acting capacity in virtually every instance in which the President concludes that an official would also make the best nominee. But for almost a century and a half under the Vacancies Act, the President had, without controversy, possessed the power to designate PAS officials to perform those roles while serving as nominees. No Senator had proposed rescinding that authority. This Court should hesitate to conclude that Congress—without comment or complaint—eliminated this longstanding presidential authority.

Second, the court of appeals' reading would substantially undercut Subsection (a)(3), which sought to expand the pool of individuals eligible for acting ser-

vice in order to give the President "more flexibility," in service of the "ultimate goal" of "ensur[ing] the most qualified individual available fills the position." *Senate Report* 31 (additional views); see *id.* at 35 (minority views). Under the court of appeals' view, Congress expanded the categories of officials eligible for acting service to serve that objective, by allowing the President to direct a senior official to perform the duties of the vacant PAS office on an acting basis—but then imposed a requirement in Subsection (b)(1) that would essentially disqualify such officials from serving if the President concluded (as he did in this case) that such an official was so highly qualified that the official would also be the appropriate permanent choice. The court of appeals' construction thus would require that officials with deep agency ties cease performing the functions and duties of vacant PAS offices precisely because they had been deemed most competent to fill the positions permanently.

An example illustrates the point. In September 2005, the head of the Federal Emergency Management Agency (FEMA) resigned while that agency was in the midst of Hurricane Katrina relief efforts. See Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. Times, Sept. 13, 2005, at A26. FEMA had no permanent Deputy Director at the time, and the President turned during the emergency to R. David Paulison to be FEMA's acting head. Paulison was a highly-experienced emergency responder who had served as the Senate-confirmed Administrator of the Fire Administration since 2001. Spencer S. Hsu & Christopher Lee, *Paulison Is Skilled at Disasters*, The Washington Post, Sept. 13, 2005, at A12; 147 Cong. Rec. 23,666 (2001).

The President later nominated Paulison to be FEMA's full-time director, and he was unanimously confirmed without controversy. See 152 Cong. Rec. 9944 (2006). Under the court of appeals' view, the President either had to select someone else to lead FEMA through some or all of its significant post-Katrina challenges, or had to decline to nominate Paulison to the post on a permanent basis.

The FEMA post is not unique for presenting urgent and sensitive needs to fill important PAS offices. Presidents would be confronted with the same Hobson's choice with regard to experienced senior officials in high-level posts concerning defense, intelligence, and diplomacy—posts for which Presidents thus far have consistently relied on FVRA authorities to make senior officials both acting designees and nominees. See App. A, *infra*, 1a-81a.

Third, extending the first-assistant-focused restrictions of Subsection (b)(1) to PAS officials serving under Subsection (a)(2) and senior agency officials serving under Subsection (a)(3) would result in strange asymmetries. In particular, it would yield the perplexing result that a person already serving in a *Senate-confirmed* office who is designated to fill another PAS office in an acting capacity under Subsection (a)(2) can virtually never be both the acting official and nominee to that office—even though a *non*-Senate-confirmed first assistant (who is often a political appointee) can *always* be both the acting PAS official and nominee so long as he was in his first-assistant post 90 days before the vacancy arose.

b. Congress undoubtedly also sought in enacting the FVRA to curtail what it considered to be "manipulation" or "gam[ing]" of the categories of individuals

that Congress had authorized to serve on an acting basis—a concern that came to the fore with the eleventh-hour first-assistant designation of Bill Lann Lee and his subsequent renomination. *Senate Report* 13; 144 Cong. Rec. at 12,432. Congress responded by targeting first-assistant appointments in which the risk of manipulation was greatest—barring a newly-appointed first assistant from serving in an acting capacity only when the first assistant was also the Executive's nominee to fill the position permanently, 5 U.S.C. 3345(b)(1), and even then only when the first assistant was not himself or herself within the category of *presidentially appointed and Senate-confirmed* first assistants whose elevation was especially unlikely to be an attempt to bypass the Senate, 5 U.S.C. 3345(b)(2).

But respondent's interpretation of the FVRA cannot be supported based on that anti-circumvention objective, because Subsections (a)(2) and (a)(3) contain their own corresponding limitations tailored to the designation authority of the President in those paragraphs. Under Subsection (a)(3), an official who has served in a sufficiently senior position at the same agency for at least 90 days during the year preceding the PAS vacancy already meets length-of-service requirements equivalent to those that Subsection (b)(1) imposes on first assistants as a condition to their serving in an acting capacity after they have been nominated by the President. Similarly, because an official directed to perform temporarily the duties of a vacant PAS office under Subsection (a)(2) *already* serves in a PAS position, that official is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role. Indeed, such officials—

who had been permitted to perform acting functions for well over a century—are much like the Senate-confirmed first assistants who are allowed to serve as acting PAS officers by virtue of Subsection (b)(2), without satisfying the requirement of 90 days' service as first assistant prior to the vacancy.[5]

In opposing certiorari, respondent hypothesized (Br. in Opp. 19) an alternative objective for the statutory scheme that respondent asserted would be advanced by its view: impeding the President from "advancing his agenda" until Senate confirmation was obtained. That account suffers from several problems. First, it is without foundation in the history surrounding the FVRA. A number of Senators expressed concern that the Vacancies Act regime in place prior to enactment of the FVRA was too inflexible, so that the President should be given the opportunity to choose among additional classes of acting officials; but no Member of Congress articulated the opposite objec-

---

[5] The Ninth Circuit speculated that the designation of "a prior Senate-confirmed officer * * * could just as easily be used for 'manipulation' as a first assistant of insufficient tenure." *Hooks* v. *Kitsap Tenant Support Servs.*, 816 F.3d 550, 561 (2016). That is not so. A Senate-confirmed official, even at another agency, has been found by the Senate to be qualified to serve in a high-ranking government position. That check is one that Congress for almost 150 years had regarded as sufficient to support acting service under the Vacancies Act, see 5 U.S.C. 3347 (1994), without apparent concerns of manipulation. Moreover, because the President does not have a free hand to make an eleventh-hour appointment to a position within this category for the purpose of establishing acting-service eligibility, such positions are not susceptible to the type of post-vacancy manipulations that gave rise to congressional protest concerning first assistants.

tive of impeding the President's oversight of the Executive Branch.

Beyond this, respondent's hypothesis is not a plausible account of the statute's operation, because it does not account for the disparities in treatment that respondent's reading of the statute would produce. Under respondent's view, Subsection (b)(1) does not categorically bar the President from "advancing his agenda" by putting into place his nominee as an acting official. Instead, it permits the President to designate an official as both an acting PAS official and a nominee if he falls within a subset of first-assistant designees under Subsection (a)(1)—all those who had 90 days of service as the first assistant before the vacancy arose. See 5 U.S.C. 3345(b)(1)(A). But appointees in first-assistant posts are no less likely to have close connections to Presidents and their agendas than the senior career agency officials whose acting service is authorized under Subsection (a)(3).

In addition, respondent's hypothesis that Congress sought to impede the President's oversight of duties performed by persons acting in vacant PAS positions is difficult to reconcile with the FVRA's expansion of the class of officers from which the President could select acting designees. By significantly increasing the pool of officials from whom the President could draw in identifying new leaders of an executive agency, that provision enhances the President's ability to "advanc[e] his agenda" through acting officers prior to Senate confirmation. Br. in Opp. 19. Respondent's reading of Subsection (b)(1) would result in potentially disruptive leadership changes, because it would force PAS officers serving under Subsection (a)(2) and senior agency officials serving under Subsection (a)(3) to step down

from acting service in those instances in which the President finds no preferable outside candidate and nominates the official to fill the post permanently. Or it would force the President to choose another nominee entirely. But it would not deprive the President of the ability to select acting designees the President believes are closely aligned with his goals.

B. The Settled Construction of the FVRA Best Accords With The Statute's Legislative History

The history of the FVRA's development confirms the soundness of the Executive's longstanding understanding of the statutory text, structure, and purposes.

When the FVRA bill was reported out of committee, it indisputably imposed no limit of the kind respondent would locate in Subsection (b)(1). It contained what was enacted as Subsection (a)(1), directing that the first assistant would automatically assume the acting role in a vacant PAS office, but further allowed the President, in what was enacted as Subsection (a)(2), to instead direct another person already serving in a PAS office to perform the duties of the vacant position on an acting basis. See *Senate Report* 25. That bill also contained, in Subsection (b), a restriction on acting service during the pendency of a nomination that explicitly applied *only* to recently appointed first assistants—the class that had raised concerns regarding circumvention and manipulation of the Vacancies Act in the first place. See *ibid.* (proposing minimum term of 180 days prior service as first assistant to avoid the bar, rather than the 90-day minimum in the version as enacted).

The amended version of the bill—containing the language at issue here—was the product of a determination to give the President *greater* flexibility in des-

ignating officials to perform the duties of vacant offices on a temporary basis. After the FVRA bill was reported out of the Senate Committee, numerous Senators objected that the bill did not give the President sufficient choice concerning acting officials. See, *e.g.*, *Senate Report* 31 (additional views of Sens. Glenn, Levin, Lieberman, Cleland, and Torricelli). They urged two changes relevant here: one to add a category of senior agency officials who could serve in a vacant PAS office in an acting capacity, and the other to shorten "the length of service requirement for first assistants who are nominees." *Ibid.* Senators reiterated these concerns in floor debates, successfully defeating cloture because the bill did not contain such flexibility-enhancing provisions. See 144 Cong. Rec. at 22,512-22,514 (statement of Sen. Levin); *id.* at 22,515-22,518 (statement of Sen. Durbin); *id.* at 22,519-22,520 (statement of Sen. Glenn); *id.* at 22,524-22,525 (statement of Sen. Lieberman); *id.* at 22,526 (failed cloture vote).

The modifications made to the proposed FVRA thereafter were designed to accommodate these Senators' objections. Those amendments added Subsection (a)(3), which allows the President to designate as an acting PAS official an individual who had served in a senior position in the agency where the vacancy arose for at least 90 days in the year preceding the vacancy. And they reduced from 180 days to 90 days the time-in-service requirement in Subsection (b) for first assistants who are also nominees. It makes little sense to think that amendments put forward for these purposes were also intended to *expand* the restriction in Subsection (b)(1).

The explanation in the Senate confirms that the flexibility-enhancing amendments were not designed to have any such effect. After the bill was reported by the Senate Committee, Senator Thompson, the Chairman of the Committee and lead sponsor of the bill, submitted a floor amendment that would have revised Subsection (b) to read essentially as it was finally enacted, reducing the length-in-service requirement from 180 days to 90 days. 144 Cong. Rec. at 22,015. During the debate on cloture, Senator Glenn stated that he intended to offer amendments to add essentially what became Subsection (a)(3) and to "further decrease" the time-in-service requirement "for a *first assistant* who will be an acting officer and the nominee to 45 days." 144 Cong. Rec. at 22,519 (emphasis added).

After the cloture vote failed—with Senator Glenn and others who wanted flexibility-enhancing amendments voting against cloture—the FVRA's sponsors put forward a compromise combining elements of the two flexibility-enhancing proposals, which contained the language ultimately enacted as Subsection (b)(1). In identifying the changes made by the revised bill as it was added to the broader legislation, Senator Thompson stated that the 180-day period in Subsection (b) "governing the length of service prior to the onset of the vacancy that the *first assistant* must satisfy" was reduced from 180 days to 90 days. 144 Cong. Rec. at 27,496 (emphasis added). And Senator Thompson expressly explained that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2)*

or 3345(a)(3)." *Ibid.* (emphasis added). That is exactly the Executive's longstanding interpretation—and it is one that every President since the statute's enactment has acted upon in submitting nominations to the Senate, without complaint by the Senate in considering and often confirming nominees.

The court of appeals rejected the legislative history as unilluminating, pointing to a description of the provision by Senator Byrd in a floor statement. Pet. App. 17a-19a; see 144 Cong. Rec. at 27,498 (stating that under the revised bill, "a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office"). But that vague language does not specifically mention Subsections (a)(2) or (a)(3) or either the PAS appointments or the career appointments at issue in this case, and thus offers little guidance here. In any event, Senator Byrd was not the author of the language he was addressing, and his statement is accordingly entitled to substantially less weight. Cf. *Corley* v. *United States*, 556 U.S. 303, 318 (2009) ("[A] sponsor's statement to the full Senate carries considerable weight."). And Senator Thompson's explanation is strongly supported by the background of the language he introduced, while the court of appeals' understanding of Senator Byrd's statement does not accord with that background.

D. The Manner In Which The FVRA Has Been Understood Since Its Enactment Confirms The Meaning Of The Plain Text

The uniform practice of Presidents and the Senate from the time of the FVRA's enactment confirms

that Subsection (b)(1)—in line with the natural reading of the "notwithstanding" clause and its author's explanation—limits only the automatic service of first assistants in vacant PAS offices.

1. This Court has explained that it is appropriate to "put significant weight upon historical practice" in interpreting constitutional provisions that "concern the allocation of power between two elected branches of Government." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted). The grounds for giving weight to historical practice in this statutory case involving the allocation of power between the two elected Branches are even stronger, because not only can the Senate reject nominees it concludes are serving unlawfully, but Congress has ample incentive and ability to enact new legislation to displace an interpretation by the Executive that it sees as trenching on its prerogatives. Cf. *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007) (deeming a 14-year period, in which Congress did not attempt to overrule this Court's interpretation of a statute, to be a "long congressional acquiescence" that enhanced the usual precedential force accorded this Court's statutory interpretations).[6] Indeed, Congress has consistently used these

---

[6] Consideration of the contemporaneous exposition of a statute's meaning by those called upon to act under the law has a longstanding pedigree in the statutory context, starting with this Court's statement in *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827), that "[i]n the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* at 210; see *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933) (stating that administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men

mechanisms and others to safeguard its prerogatives concerning appointments. For instance, when Members of Congress perceived the Executive Branch to be violating the limitations of the Vacancies Act, they demanded explanations, solicited reports from congressional watchdog entities, held hearings, and ultimately proposed and passed legislation addressing their concerns. See pp. 6-10, *supra*.

2. The FVRA's allocation of power between the Executive and Congress is illuminated by the unusually clear and contemporaneous record of how the statute was understood by both those Branches. That understanding is reflected in written documents and unbroken practice. OLC and the GAO, the congressional instrumentality with a formal role in the FVRA's enforcement scheme, see 5 U.S.C. 3349, have each set forth the understanding that the limits of Subsection (b)(1) apply only to first assistants, with OLC doing so in written guidance shortly after the statute was enacted and the GAO doing so in a letter concerning FVRA enforcement in 2001. 23 Op. O.L.C. at 64 (1999); Joyner 3-4.

The GAO's approach is of particular note because the GAO has routinely identified and criticized designations and related actions that it regards as contrary to statutory mandates—both before and after the enactment of the FVRA. See, *e.g.*, GAO, *Violation of the 210-Day Limit Imposed by the Vacancies Reform Act* (Mar. 18, 2002), http://www.gao.gov/assets/80/75124.pdf (concluding that the Acting General Counsel

---

charged with the responsibility of setting its machinery in motion"); see also, *e.g.*, *Schell's Ex'rs* v. *Fauché*, 138 U.S. 562, 572 (1891); *United States* v. *Hill*, 120 U.S. 169, 182 (1887); *United States* v. *Alabama Great S. R.R.*, 142 U.S. 615, 621 (1892).

in the Department of Agriculture had been improperly designated as acting, and had served in excess of the FVRA's time limits); GAO, *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998* (July 12, 2006), http://www.gao.gov/assets/80/75113.pdf (concluding that an Acting Assistant Secretary of Commerce had served in violation of the FVRA's time limits); GAO, *Homeland Security: DHS's Actions to Recruit and Retain Staff and Comply with the Vacancies Act* (July 2007), http://www.gao.gov/assets/270/264033.pdf (identifying deficiencies in DHS's procedures for Vacancies Act compliance); see also *CRS Validity Memo* 4 (noting that during controversies about acting designations prior to the enactment of the FVRA, the Comptroller General, who heads the GAO, challenged the Executive Branch's understanding of its designation authorities with "persistence and consistency"); *Vacancies Act Hearing* 152 (testimony of Comptroller General noting that GAO has "often been called upon by Members of Congress to issue opinions concerning officials who are serving in 'acting' capacities in various Executive departments or agencies without Senate confirmation").

The understanding reflected in the statements of OLC and the GAO is reinforced by unbroken practice under the FVRA. Beginning immediately after the statute was enacted, and continuing to the present, Presidents have directed officials to perform the duties of vacant offices pursuant to Subsections (a)(2) or (a)(3), and also nominated those same officials for permanent appointment to those offices, even when those officials had not been first assistants for at least 90 days preceding the vacancy. By the government's

tally there have been more than 100 such designations and nominations since the FVRA was enacted, made by all three Presidents subject to the statute. See App. A, *infra*, 1a-81a.

Those designations have covered a wide range of significant offices in departments and agencies throughout the Executive Branch. They have included key defense and national security nominees (including a Deputy Director of Central Intelligence, a Deputy Secretary of Defense, a Secretary of the Air Force, an Under Secretary of the Treasury for Terrorism and Financial Intelligence, heads of the National Nuclear Security Administration, and a head of the Transportation Security Administration); numerous agency heads (such as an Administrator of the U.S. Agency for International Development, an Administrator of the Small Business Administration, two directors of the Office of Personnel Management, and a Director of the National Science Foundation), and high-ranking officials in the Department of Justice (including three Deputy Attorneys General, three Associate Attorneys General, a Director of the Marshals Service, and two Directors of the Bureau of Alcohol, Tobacco, Firearms and Explosives).

The nominees' acting service and prior posts are part of the record routinely placed before the Senate in connection with the confirmation process, in testimony and questionnaires. See, *e.g.*, *Nominations of David W. Ogden of Virginia and Robert Raben of Florida, Each to be Assistant Attorney General for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. 19-21, 28 (1999) (committee testimony); *Confirmation Hearing on the Nomination of James B. Comey, Jr., of*

New York, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 108 Cong., 1st Sess. 7-8 (2003) (committee questionnaire); *Nominations to the Department of Transportation, the National Aeronautics and Space Administration and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 110th Cong., 1st Sess. 7-8, 16-18 (2007) (committee questionnaire); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 838, 889 (2009) (committee testimony and committee questionnaire).

Indeed, Senators sometimes introduce nominees at confirmation hearings by noting their simultaneous acting service. See, *e.g.*, *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 3 (2003) (statement of Sen. Allen); *Nominations of the 108th Congress: Hearing Before the Senate Comm. on Environment and Public Works*, 108th Cong., 2d Sess. 1 (2004) (statement of Sen. Inhofe); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 838 (2009) (statement of Sen. Levin); *Nominations to the U.S. Department of Commerce and the Federal Trade Commission: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 112th Cong., 1st Sess. 2-4 (2011) (statements of Sens. Rockefeller, Lautenberg, and Hutchison). And Presi-

dents frequently issue public notices stating that a nominee is also performing the duties of the vacant office in an acting capacity.[7]

As far as the government is aware, the Executive's consistent and oft-invoked interpretation never prompted objection from the Senate—or even an individual Senator—prior to the decision below.[8] Instead, across three Administrations, the Senate has regularly confirmed nominees whose simultaneous service as acting officer and nominee would have violated the FVRA under respondent's view. This unbroken practice deserves significant weight in construing the FVRA's allocation of power between Congress and the President. The understanding reflected in that practice—

---

[7] See, *e.g.*, The American Presidency Project, George W. Bush, *Personnel Announcement* (Apr. 15, 2005), http://www.presidency.ucsb.edu/ws/?pid=81783 (statement announcing President's intention to nominate Raymond Simon to be Deputy Secretary of Education, and to designate him as the acting official for the same position); The American Presidency Project, George W. Bush, *Personnel Announcement* (Apr. 27, 2006), http://www.presidency.ucsb.edu/ws/?pid=82393 (statement announcing President's intention to nominate James B. Lockhart III to be Director of the Office of Federal Housing Enterprise Oversight, and also to designate him as the acting official for that position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (Sept. 20, 2012), https://www.whitehouse.gov/the-press-office/2012/09/20/president-obama-announces-more-key-administration-posts (press release announcing President's intention to nominate Tony West to be Associate Attorney General, and also indicating his then-current acting service in that role).

[8] Following the decision below, several Senators, in light of the decision, have called into question the service of a few acting officials who were nominated to fill on a permanent basis the positions that they occupied on an acting basis. See Pet. 28-29.

which is consistent with the statute's text, structure, purposes, and history—should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
BENJAMIN M. SHULTZ
Attorneys

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA J. DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

AUGUST 2016

APPENDIX A

Officials Whose Acting Service Under 5 U.S.C. 3345(a)(2) or (a)(3) Would Have Been Unlawful Under The Court of Appeals' Decision[1]

---

[1] All nominations and confirmations can be found at https://www.congress.gov/nominations. Where an individual was nominated multiple times to fill the same vacancy, only the first nomination date is provided. Designations cited in this appendix are on file with the Office of the Solicitor General. For each acting official, the materials in the footnote establish that the individual who served in an acting capacity was not the first assistant to the vacant post for at least 90 days in the year preceding the vacancy. This chart does not include nominees designated to perform the functions and duties of a vacant office under the FVRA if the agency at which the vacancy arose was unable to determine what position would have qualified as first assistant to the vacant PAS post at the time of the acting designation, and could not otherwise rule out that the designee served at least 90 days as first assistant in the year preceding the vacancy.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David W. Ogden[2]	Assistant Attorney General (Civil)	2/1/99	6/10/99	Attorney General's Chief of Staff	12/15/00
Edward B. Montgomery[3]	Deputy Secretary of Labor	5/13/99	1/24/00	Counselor to the Secretary of Labor	5/24/00

---

[2] Memorandum from William J. Clinton for David W. Ogden (Feb. 1, 1999) (designation and prior position); *Nominations of David W. Ogden, of Virginia; and Robert Raben, of Florida, Each to be Assistant Attorney General for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. 19, 20, 22 (1999) (prior positions); 28 C.F.R. 0.132 (1999) (explaining that in the absence of a designation by the Attorney General, the ranking or principal deputy to a position is its first assistant).

[3] Memorandum from William J. Clinton for Edward B. Montgomery (May 13, 1999) (designation); *Curriculum Vitae, Hon. Edward B. Montgomery*, http://www18.georgetown.edu/data/people/ebm48/cv.pdf (prior positions). The Department of Labor informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Alan Philip Larson[4]	Under Secretary of State (Economic, Business, and Agricultural Affairs)	8/17/99	10/8/99	Assistant Secretary of State (Economic and Business Affairs) (Senate Confirmed)	11/19/99
Mary Lou Leary[5]	Assistant Attorney General (Justice Programs)	2/25/00	9/22/00	Deputy Associate Attorney General & Chief of Staff to the Associate Attorney General	

[4] Memorandum from William J. Clinton for Alan Philip Larson (Aug. 17, 1999) (designation and prior position); Office of the Historian, Dep't of State, *Alan Philip Larson*, https://history.state.gov/departmenthistory/people/larson-alan-philip (last visited Aug. 12, 2016)(prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[5] Memorandum from William J. Clinton for Mary Lou Leary (Feb. 25, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Mary Lou Leary as Acting Assistant Attorney General in the Office of Justice Programs at the Department of Justice* (Feb. 7, 2000), http://

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Marjory E. Searing[6]	Assistant Secretary of Commerce and Director General of the U.S. and Foreign Commercial Service	3/13/00	6/30/00	Deputy Assistant Secretary of Commerce (Asia Pacific)	12/15/00

---

clinton6.nara.gov/2000/02/2000-02-07-president-names-leary-to-department-of-justice.html (prior positions); Senate Comm. on Governmental Affairs, 106th Cong., 2d Sess., *Policy and Supporting Positions* 146-147 (Comm. Print 2000) (*2000 Plum Book*) (structure of the Office of General Counsel) (showing that none of Leary's prior positions were within the Office of Justice Programs).

[6] Memorandum from William J. Clinton for Marjory E. Searing (Mar. 13, 2000) (designation and prior position); *Nominations of Richard Court Houseworth, Nuria I. Fernandez, Marjory E. Searing, and Robert S. LaRussa: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 106th Cong., 2d Sess. 62 (2000) (prior positions); Dep't of Commerce, Department Organization Order (DOO) 40-1, Amend. 5 (issuance date Nov. 16, 1998) (on file with the Office of the Solicitor General) (indicating that the first assistant was the Deputy Director General of the U.S. Foreign and Commercial Service).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Judith A. Winston[7]	Under Secretary of Education	3/13/00	7/13/00	General Counsel, Department of Education (Senate Confirmed)	
Robert S. LaRussa[8]	Under Secretary of Commerce (International Trade)	5/11/00	5/25/00	Assistant Secretary of Commerce (Import Administration) (Senate Confirmed)	12/15/00

[7] Memorandum from William J. Clinton for Judith A. Winston (Mar. 13, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Judith A. Winston as Under Secretary at the Department of Education* (Dec. 27, 2000), http://clinton6.nara.gov/2000/12/2000-12-27-winston-named-as-under-secretary-at-department-of-education.html (prior positions); *2000 Plum Book* 76-77 (showing that the General Counsel was in a different work unit than the Under Secretary).

[8] Memorandum from William J. Clinton for Robert S. LaRussa (May 11, 2000) (designation and prior position); *Nominations of Richard Court Houseworth, Nuria I. Fernandez, Marjory E. Searing, and Robert S. LaRussa: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 106th Cong., 2d Sess. 67-68 (2000)

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Julie E. Samuels[9]	Director, National Institute of Justice, Department of Justice	5/16/00	12/15/00	Director for Policy, Criminal Division, Department of Justice	
Richard A. Boucher[10]	Assistant Secretary of State (Public Affairs)	6/14/00	6/13/00	Spokesman of the Department of State	12/15/00

(prior positions); DOO 40-1, § 4 (June 26, 2000) on file with the Office of the Solicitor General (indicating that the Deputy Under Secretary for International Trade was the first assistant).

[9] Memorandum from William J. Clinton for Julie E. Samuels (May 16, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Julie E. Samuels as Director of the National Institute of Justice at the Department of Justice* (Dec. 20, 2000), http://clinton6.nara.gov/2000/12/2000-12-20-samuels-named-director-of-the-nij.html (prior positions); *2000 Plum Book* 146 (indicating that none of Samuels's prior positions were within the National Institute of Justice).

[10] Memorandum from William J. Clinton for Richard A. Boucher (June 14, 2000) (designation and prior position); Dep't of State, *Biography of Richard A. Boucher* (Feb. 21, 2006), http://2001-2009.state.gov/r/pa/ei/biog/ 61773.htm (prior positions); Dep't of State, *Assistant Secretaries of State for Public Affairs*, http://2001-2009.state.gov/r/pa/ho/

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
John McLaughlin[11]	Deputy Director of Central Intelligence	6/28/00	7/13/00	Deputy Director for Central Intelligence	10/18/00

---

po/12109.htm (last visited Aug. 12, 2016) (showing that the Assistant Secretary position became vacant in April 2000, and that Boucher began his service as Spokesman that same month); 1 Dep't of State, *Foreign Affairs Manual* 322.1 (1995) (on file with the Office of the Solicitor General) (indicating that the Principal Deputy Assistant Secretary and Spokesman of the Department is the first assistant).

[11] Memorandum from William J. Clinton for John A. McLaughlin (June 28, 2000) (designation and prior position); CIA, *John E. McLaughlin*, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/directors-and-deputy-directors-of-central-intelligence/mclaughlin.html (prior positions); *CIA Organization Chart* (Dec. 2000), https://upload.wikimedia.org/wikipedia/en/f/ff/Cia_org_chart_2000_dec.png (CIA structure).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Mark J. Mazur[12]	Administrator, Energy Information Administration, Department of Energy	8/4/00	10/17/00	Director of the Office of Policy, Department of Energy	

[12] Memorandum from William J. Clinton for Mark J. Mazur (Aug. 4, 2000) (designation); *Nominations of Mark J. Mazur, Matthew S. Rutherford, and Meredith M. Broadbent: Hearing Before the Senate Comm. on Finance*, 112th Cong., 2d Sess. 63 (2012) (listing prior positions held before Mazur's designation as the Acting Administrator); *2000 Plum Book* 84-104 (structure of the Department of Energy).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Glenn A. Fine[13]	Inspector General, Department of Justice	8/10/00	5/15/2000	Director, Special Investigations and Review Unit, Office of the Inspector General, Department of Justice	12/15/00

[13] Memorandum from William J. Clinton for Glenn A. Fine (Aug. 10, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Glenn A. Fine Inspector General of the Department of Justice* (May 15, 2000), http://clinton6.nara.gov/2000/05/2000-05-15-fine-named-as-inspector-general-of-the-department-of-justice.html (prior positions); Dep't of Defense, *Biography, Glenn A. Fine*, http://www.defense.gov/About-DoD/Biographies/Biography-View/Article/602703/glenn-a-fine (last visited Aug. 12, 2016) (prior positions); Dep't of Justice, *Organization Chart, Office of the Inspector General* (May 29, 1998) (on file with the Office of the Solicitor General) (showing that none of Fine's prior positions would have been the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James A. Dorskind[14]	General Counsel, Department of Commerce	9/14/00	10/25/00	General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce	
Kenneth Lee Smith[15]	Assistant Secretary of the Interior (Fish and Wildlife)	9/14/00	10/25/00	Deputy Chief of Staff (Office of the Secretary of the Interior)	

[14] Memorandum from William J. Clinton for James A. Dorskind (Sept. 14, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names James A. Dorskind as General Counsel at the Department of Commerce* (Dec. 21, 2000) http://clinton6.nara.gov/2000/12/2000-12-21-dorskind-named-general-counsel-at-the-department-of-commerce.html (prior positions); *2000 Plum Book* 32-33 (structure of the Office of General Counsel).

[15] Memorandum from William J. Clinton for Kenneth Lee Smith (Sept. 14, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Kenneth Lee Smith to*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Linton F. Brooks[16]	Under Secretary for Nuclear Security, Department of Energy	7/9/02	2/4/03	Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, Department of Energy (Senate Confirmed)	5/1/03

Serve as Assistant Secretary for Fish, Wildlife, and Parks at the Department of the Interior (Dec. 21, 2000), http://clinton6.nara.gov/2000/12/2000-12-22-smith-named-assistant-secretary-for-fish-wildlife-and-parks.html (prior positions); Derek Catron, *Talk of Suit May Push State to Aid Manatees*, Orlando Sentinel, Aug. 10, 2000, at D1 (showing that the vacancy began in July 2000); *2000 Plum Book* 129, 132-133 (demonstrating that none of Smith's prior positions from before 1999 were within the Office of the Assistant Secretary (Fish and Wildlife)).

[16] Memorandum from George W. Bush for Linton F Brooks (July 9, 2002) (designation and prior position); *Nominations Before the Senate Armed Services Comm.: Hearings Before the Senate Comm. on Armed Services*, 108th

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Charles W. Grim[17]	Director, Indian Health Service, Department of Health & Human Services	8/12/02	3/27/03	Director, Oklahoma City Area Office, Indian Health Service	7/16/03

Cong., 1st Sess. 82-83 (2003) (prior positions); 50 U.S.C. 2403 (identifying the Principal Deputy Administrator for Nuclear Security as the first assistant).

[17] Memorandum from George W. Bush for Charles W. Grim (Aug. 12, 2002) (designation and prior position); The American Presidency Project, George W. Bush, *Nominations and Appointments* (Aug. 1, 2002), http://www.presidency.ucsb.edu/ws/?pid=79721 (prior positions); Dep't of Health & Human Servs., *Indian Health Serv., Organization Chart* (Feb. 12, 2002) (on file with the Office of the Solicitor General) (showing that none of Grim's prior positions would have been understood to be the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James M. Loy[18]	Under Secretary of Transportation for Security	11/12/02	11/14/02	Deputy Under Secretary of Transportation for Security	11/18/02
R. Hewitt Pate[19]	Assistant Attorney General (Antitrust)	12/3/02	3/13/2003	Deputy Assistant Attorney General (Antitrust)	6/13/03

[18] Memorandum from George W. Bush for Admiral James M. Loy (Nov. 12, 2002) (designation and prior position); *Transportation Security Administration Gets New Chief; Secretary Mineta Emphasizes Difficulty of the Job*, Federal Information and News Dispatch, Inc., July 18, 2002 (noting that the vacancy was created in July 2002); U.S. Coast Guard, U.S. Dep't of Homeland Sec., *James M. Loy, 1998-2002* (Jan. 12, 2016), http://www.uscg.mil/history/CCG/Loy/jmloy_bio.asp (indicating that Loy had been in a different position—Commandant of the Coast Guard—through the end of May 2002).

[19] Memorandum from George W. Bush for R. Hewitt Pate (Dec. 3, 2002) (designation and prior position); *Confirmation Hearing on the Nomination of R. Hewitt Pate to be Assistant Attorney General, Antitrust Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 8 (2003) (prior position); 28 C.F.R. 0.132 (2002) (explaining how to identify the first assistant at the Department of Justice); Curt

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Robert D. McCallum, Jr.[20]	Associate Attorney General	3/28/03	4/2/2003	Assistant Attorney General (Civil) (Senate Confirmed)	6/27/03

Anderson, *Justice Department Welcomes Judges' Decision in Microsoft Case*, Associated Press, Nov. 1, 2002 (noting that a different individual was the top deputy in the Antitrust Division).

[20] Memorandum from George W. Bush for Robert D. McCallum, Jr. (Mar. 28, 2003) (designation and prior position); *Confirmation Hearing on Nominations of Robert D. McCallum, Jr. to be Associate Attorney General and Peter D. Keisler to be Assistant Attorney General, Civil Division: Hearing Before the Senate Comm. on the* Judiciary, 108th Cong., 1st Sess. 8 (2003) (prior position); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); *Two Men Appointed to Serve Under the Attorney General*, State News Service, May 23, 2002 (showing that another individual served as the Principal Deputy Associate Attorney General).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Daniel J. Bryant[21]	Assistant Attorney General (Legal Policy)	6/3/03	7/8/03	Counsel and Senior Advisor to the Attorney General	10/3/03
Christopher A. Wray[22]	Assistant Attorney General (Criminal)	6/17/03	6/9/03	Principal Associate Deputy Attorney General	9/11/03

[21] Memorandum from George W. Bush for Daniel J. Bryant (June 3, 2003) (designation and prior position); *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 11 (2003) (prior positions, including as the Senate-Confirmed Assistant Attorney General (Legislative Affairs)); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); Dep't of Justice, *Organization Chart, Office of Legal Policy* (July 1, 2002) (on file with the Office of the Solicitor General) (showing the existence of a Principal Deputy position).

[22] Memorandum from George W. Bush for Christopher A. Wray (June 16, 2003) (designation, effective date of June 17, 2003, and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Stephen L. Johnson[21]	Deputy Administrator, Environmental Protection Agency	7/11/03	1/21/04	Assistant Administrator (Prevention, Pesticides, Toxic Substances), Environmental Protection Agency (Senate Confirmed)	11/21/04

Comm. on the Judiciary, 108th Cong., 1st Sess., Pt. 3, at 849 (2003) (prior positions); House Comm. on Government Reform, 108th Cong., 2d Sess., *Policy & Supporting Positions* 94-96 (Comm. Print 2004) (*2004 Plum Book*) (showing that none of Wray's prior positions were within the Criminal Division).

[21] Memorandum from George W. Bush for Stephen L. Johnson (July 11, 2003) (designation and prior position). The Environmental Protection Agency informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Eugene Hickok[24]	Deputy Secretary of Education	7/24/03	1/28/04	Under Secretary of Education (Senate Confirmed)	11/21/04
Michele M. Leonhart[25]	Deputy Administrator, Drug Enforcement Administration, Department of Justice	9/6/03	10/3/03	Special Agent in Charge of the L.A. Field Office, Drug Enforcement Administration, Department of Justice	3/8/04

[24] Memorandum from George W. Bush for Eugene Hickok (July 24, 2003) (designation and prior position); George W. Bush, The American Presidency Project, *Personnel Announcement* (*Personnel Announcement)* (Oct. 31, 2003), http://www.presidency.ucsb.edu/ws/?pid=79929 (prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[25] Memorandum from George W. Bush for Michele M. Leonhart (Sept. 6, 2003) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 111th Cong., 2d Sess., Pt. 8, at 556-557 (2010) (prior positions); Dep't of Justice, *Organization Chart, Drug Enforcement*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Susan K. Sclafani[26]	Assistant Secretary of Education (Vocational and Adult Education)	9/6/03	10/29/03	Counselor to the Secretary of Education	1/26/04
Brian Carlton Roseboro[27]	Under Secretary of the Treasury (Domestic Finance)	10/7/03	12/9/03	Assistant Secretary of the Treasury (Financial Markets) (Senate Confirmed)	4/8/04

Administration (May 23, 1995) (on file with the Office of the Solicitor General) (showing that none of Leonhart's prior positions could the first assistant).

[26] Memorandum from George W. Bush for Susan K. Sclafani (Sept. 6, 2003) (designation and prior position); *Personnel Announcement* (Sept. 3, 2003), http://www.presidency.ucsb.edu/ws/?pid=80573 (prior positions); *2000 Plum Book* 75, 83 (showing that a position in the Office of the Secretary would not have been in the Office of Vocational and Adult Education).

[27] Memorandum from George W. Bush for Brian Carlton Roseboro (Oct. 6, 2003) (designation, effective date of Oct. 7, 2003, and prior position); *Nominations of Dr. Mark B. McClellan, Brian Roseboro, Donald Korb, and Mark Warshawsky: Hearing Before the Senate Comm. on Finance*, 108th Cong., 2d Sess. 210 (2004) (prior positions); Lawrence H. Summers, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (Jan.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James B. Comey[28]	Deputy Attorney General	11/19/03	10/17/03	U.S. Attorney (S.D.N.Y.) (Senate Confirmed)	12/9/03
Kirk Van Tine[29]	Deputy Secretary of Transportation	12/10/03	1/26/04	Counselor to the Secretary of Transportation	

12, 2001) (on file with the Office of the Solicitor General) (designating the Fiscal Assistant Secretary as first assistant).

[28] Memorandum from George W. Bush for James B. Comey (Nov. 19, 2003) (designation and prior position); *Confirmation Hearing on the Nomination of James B. Comey, Jr., of New York, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108 Cong., 1st Sess. 7-8 (2003) (prior positions); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); *2004 Plum Book* 94 (showing that there was a "Principal Associate Deputy Attorney General" position).

[29] Memorandum from George W. Bush for Kirk Van Tine (Dec. 10, 2003) (designation and prior position). The Department of Transportation informs this Office that the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Gordon H. Mansfield[30]	Deputy Secretary of Veterans Affairs	12/19/03	11/3/03	Assistant Secretary of Veterans Affairs for Congressional Affairs (Senate Confirmed)	1/22/04
Arden Bement[31]	Director, National Science Foundation	2/23/04	9/15/04	Director, National Institute for Standards and Technology, Department of Commerce (Senate Confirmed)	11/21/04

[30] Memorandum from George W. Bush for Gordon H. Mansfield (Dec. 19, 2003) (designation and prior position); 159 Cong. Rec. S649 (daily ed. Feb. 12, 2013) (statement of Sen. Burr) (prior position). The Department of Veterans Affairs informs this Office that at the relevant time, this position had no first assistant.

[31] Memorandum from George W. Bush for Arden Bement, Jr. (Feb. 23, 2004) (designation and prior position); Nat'l Science Found., *Biography, Dr. Arden L. Bement, Jr.*, http://www.nsf.gov/news/speeches/bement/bement_bio.jsp (last visited Aug. 12, 2016) (prior positions, none of which were at the National Science Foundation).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Patrick P. O'Carroll[32]	Inspector General, Social Security Administration	3/10/04	4/8/04	Assistant Inspector General for Investigations, Social Security Administration	11/21/04

[32] Memorandum from George W. Bush for Patrick P O'Carroll, Jr. (Mar. 10, 2004) (designation); *Nominations of J. Russell George, Patrick P. O'Carroll, Jr., Timothy Bitsberger, and Paul Jones: Hearing Before the Senate Comm. on Finance*, 108th Cong., 2d Sess. 87, 90 (2004) (prior positions); Office of the Inspector Gen., Soc. Sec'y Admin., *Semiannual Report to Congress* 89 (Apr. 1, 2003-Sept. 30, 2003) (organization chart).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas V. Skinner[33]	Assistant Administrator (Enforcement and Compliance Assurance), Environmental Protection Agency	4/1/04	9/8/04	Region 5 Administrator, Environmental Protection Agency	

[33] Memorandum from George W. Bush for Thomas V. Skinner (Apr. 1, 2004) (designation and prior position); News Release, EPA, *Thomas V. Skinner Named as Acting Assistant Administrator for the Office of Enforcement*, (Apr. 5, 2004), https://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/03ffc5d37a59d3f385256e6d0050c93f (past positions); *2004 Plum Book* 161 (showing the existence of a principal deputy position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Garman[34]	Under Secretary of Energy	4/19/04	3/4/05	Assistant Secretary of Energy (Efficiency and Renewable Energy) (Senate Confirmed)	6/15/05
John S. Shaw[35]	Assistant Secretary of Energy (Environment, Safety and Health)	7/26/04	7/22/04	Deputy Chief of Staff and White House Liaison, Department of Energy	12/8/04

[34] Memorandum from George W. Bush for David Garman (Apr. 19, 2004) (designation and prior position); Dep't of Energy, *David K. Garman Sworn in as Under Secretary of Energy* (June 23, 2005), http://energy.gov/articles/david-k-garman-sworn-under-secretary-energy (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

[35] Memorandum from George W. Bush for John S. Shaw (July 26, 2004) (designation and prior position); *Harbert and Shaw Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 108th Cong., 2d Sess. 7 (2004) (prior positions); EHS Today, *Two Top Energy Department Officials Resign* (Apr. 5, 2004),

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Daniel R. Levinson[36]	Inspector General, Department of Health & Human Services	9/8/04	1/24/05	Inspector General, General Services Administration (Senate Confirmed)	6/8/05

---

ehstoday.com/news/ehs_imp_36929 (showing that the position became vacant on April 16, 2004); Al Kamen, *Jaws and Paws*, Washington Post, Feb. 14, 2003, at A29 (explaining that although Shaw had once been the Principal Deputy Assistant Secretary for Environment, Safety, and Health, he left that position in February 2003).

[36] Memorandum from George W. Bush for Daniel R. Levinson (Sept. 8, 2004) (designation and prior position); *Nominations of Daniel R. Levinson, Harold Damelin, and Raymond T. Wagner, Jr.: Hearing Before the Senate Comm. on* Finance, 109th Cong., 1st Sess. 29 (2005) (showing that Levinson had been at another agency since at least 2001); Christopher Marquis, *A Top Health Official Resigns Under Pressure*, N.Y. Times, Mar. 5, 2003, at A19 (vacancy creation date).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Raymond Simon[37]	Deputy Secretary of Education	4/18/05	4/15/05	Assistant Secretary of Education (Elementary and Secondary Education) (Senate Confirmed)	5/26/05
Alex M. Azar II[38]	Deputy Secretary of Health and Human Services	4/20/05	4/19/05	General Counsel, Department of Health and Human Services (Senate Confirmed)	7/22/05

[37] Memorandum from George W. Bush for Raymond Simon (Apr. 18, 2005) (designation and prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[38] Memorandum from George W. Bush for Alex Azar II (Apr. 20, 2005) (designation and prior position); *Nominations of Alex Azar II, Timothy D. Adams, Suzanne C. DeFrancis, Charles E. Johnson, and Shara L. Aranoff: Hearing Before the Senate Comm. on Finance*, 109th Cong., 1st Sess. 63 (2005) (prior position). The Department of Health and Human Services informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David A. Sampson[39]	Deputy Secretary of Commerce	5/2/05	4/4/05	Assistant Secretary of Commerce (Economic Development) (Senate Confirmed)	7/22/05
Gordon England[40]	Deputy Secretary of Defense	5/13/05	4/7/05	Secretary of the Navy (Senate Confirmed)	4/6/06

[39] Memorandum from George W. Bush for David A. Sampson (May 2, 2005) (designation and prior position); *Nominations of David A. Sampson, to be Deputy Secretary, and John J. Sullivan, to be General Counsel of the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 109th Cong., 1st Sess. 6 (2005) (prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[40] Memorandum from George W. Bush for Gordon England (May 13, 2005) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 109th Cong., 1st Sess. 181 (2005) (prior position). The Department of Defense informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James Lambright[41]	President of the Export Import Bank	7/21/05	2/13/06	Executive Vice President of the Export-Import Bank	7/26/06
John F. Clark[42]	Director, Marshals Service, Department of Justice	7/29/05	10/21/05	U.S. Marshal (E.D. Va.) (Senate Confirmed)	3/16/06

[41] Memorandum from George W. Bush for James Lambright (July 14, 2005) (designation, effective date of July 21, 2005, and prior position); *Nominations of: James Lambright, Armando J. Bucelo, Jr., Todd S. Farha, John T. Rymer, John W. Cox, and William Hardiman: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong., 2d Sess. 33 (2006) (prior positions); 12 U.S.C. 635a(b) (making the First Vice President the first assistant).

[42] Memorandum from George W Bush for John F. Clark (July 29, 2005) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. Pt. 3, at 247-248 (2006) (prior positions); Dep't of Justice, *Organization Chart, United States Marshals*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
R. David Paulison[43]	Under Secretary of Homeland Security (Emergency Preparedness and Response)	9/12/05	4/6/06	Administrator, Fire Administration, Department of Homeland Security (Senate Confirmed)	5/26/06

Service (Oct. 27, 2004) (on file with the Office of the Solicitor General) (showing that none of Clark's prior positions could have been understood as the first assistant).

[43] Memorandum from George W. Bush for R. David Paulison (Sept. 12, 2005) (designation and prior position); *Nomination of R. David Paulison: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs*, 109th Cong., 2d Sess. 1, 49 (2006) (listing prior positions, and noting that this position serves as the "Director of FEMA"); 44 C.F.R. 2.11 (2005) (explaining that the FEMA Deputy Director is the first assistant to FEMA's Director).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Santanu K. Baruah[44]	Assistant Secretary of Commerce (Economic Development)	9/15/05	9/6/05	Deputy Assistant Secretary of Commerce for Program Operations and Chief of Staff	12/17/05

[44] Memorandum from George W. Bush for Santanu K. Baruah (Sept. 15, 2005) (designation); *Nominations of Santanu K. Baruah; George M. Gray; Lyons Gray; H. Dale Hall; and Edward McGaffigan, Jr.: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 1st Sess. 16, 33 (2005) (prior positions); DOO 10-4, § 3.03 (issuance date Apr. 15, 2004) (on file with the Office of the Solicitor General) (indicating that the Deputy Assistant Secretary for Economic Development was the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Andrew von Eschenbach[45]	Commissioner, Food and Drug Administration, Department of Health and Human Services	9/23/05	3/15/06	Director, National Cancer Institute, Department of Health and Human Services	12/7/06
Paul J. McNulty[46]	Deputy Attorney General	11/1/05	11/9/05	U.S. Attorney (E.D. Va.) (Senate Confirmed)	3/16/06

[45] Memorandum from George W. Bush for Andrew von Eschenbach (Sept. 23, 2005) (designation and prior position); FDA, Dep't of Health & Human Servs., *Biography of Andrew C. von Eschenbach, M.D.* (Feb. 20, 2009), http://www.fda.gov/AboutFDA/WhatWeDo/History/Leaders/Commissioners/ucm093711.htm (prior positions); Memorandum from the Acting Commissioner of Food and Drugs 1 (Nov. 10, 2004) (designating the Deputy Commissioner as the first assistant).

[46] Memorandum from George W. Bush for Paul J. McNulty (Nov. 1, 2005) (designation and prior position); *Confirmation Hearing on the Nomination of Paul J. McNulty, of Virginia, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 11 (2006) (prior positions, including that McNulty had not served as Principal Associate Deputy Attorney General since 2001); Eric

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sharee M. Freeman[47]	Director, Community Relations Service, Department of Justice	12/20/05	12/20/05	Counselor to the Assistant Attorney General, Civil Rights Division	3/31/06

Lichtblau, *President Picks 2nd Nominee for Justice Post*, N.Y. Times, Oct. 22, 2005, at A15 (indicating that the Deputy Attorney General position became vacant in August 2005); 28 C.F.R. 0.137(b) (2005) (explaining that the "Principal Deputy" to a position is the first assistant).

[47] Memorandum from George W. Bush for Sharee M. Freeman (Dec. 20, 2005) (designation and prior position); *Personnel Announcement* (Dec. 19, 2005), http://www.presidency.ucsb.edu/ws/?pid=82312 (prior positions); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., Pt. 3, at 527 (2006) (prior positions, including four years of service as the Director of the Community Relations Service, which ended approximately a month before she was renominated and designated as acting).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
William Ludwig Wehrum, Jr.[46]	Assistant Administrator (Air and Radiation), Environmental Protection Agency	3/2/06	2/27/06	Principal Deputy Assistant Administrator, Office of Air and Radiation, Environmental Protection Agency	

[46] Memorandum from George W. Bush for William Ludwig Wehrum, Jr. (Mar. 2, 2006) (designation and prior position); *Nominations of Richard Capka, James B. Gulliford and William L. Wehrum: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 2d Sess. 142 (2006) (prior positions, including that he was not named as the Principal Deputy Assistant Administrator until August 2005); *Wehrum to Run EPA Air Office*, Inside Energy with Federal Lands (Aug. 1, 2005) (explaining that the vacancy did not arise until August 2005).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas E. Harvey[49]	Assistant Secretary of Veterans Affairs (Congressional Affairs)	3/20/06	6/26/06	Senior Advisor to the Secretary of Veterans Affairs	5/25/07

[49] Memorandum from George W. Bush for Thomas E. Harvey (Mar. 20, 2006) (designation and prior position); *Nominations of Thomas E. Harvey to be Assistant Secretary for Congressional and Legislative Affairs, Department of Veterans Affairs; and Patrick W. Dunne to be Assistant Secretary for Policy and Planning, Department of Veterans Affairs: Hearing Before the Senate Comm. on Veterans' Affairs*, 109th Cong., 2d Sess. 9-10 (2006) (prior positions); *2004 Plum Book* 144, 146 (showing that none of Harvey's prior positions were within the Office of the Assistant Secretary for Congressional and Legislative Affairs).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James B. Lockhart III[50]	Director, Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development	4/28/06	4/27/06	Deputy Commissioner of Social Security (Senate Confirmed)	6/15/06

[50] Memorandum from George W. Bush for James B. Lockhart III (Apr. 28, 2006) (designation and prior position); *Nominations of Shelia Bair, James B. Lockhart, III, Donald L. Kohn, and Kathleen L. Casey: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong., 2d Sess. 35 (2006) (prior positions, none of which were within the Department of Housing and Urban Development).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael J. Sullivan[51]	Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice	8/31/06	3/22/07	U.S. Attorney (D. Mass.) (Senate Confirmed)	

[51] Memorandum from George W. Bush for Michael J. Sullivan (Aug. 31, 2006) (designation and prior position); Ashcroft Law Firm, *Michael Sullivan*, http://ashcroftlawfirm.com/professionals/michael-sullivan/ (last visited Aug. 12, 2016) (prior positions); Dep't of Justice, *Organization Chart, Bureau of Alcohol, Tobacco, Firearms and Explosives* (Oct. 17, 2005) (on file with the Office of the Solicitor General) (showing that a U.S. Attorney would not have been the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
William W. Mercer[52]	Associate Attorney General	9/6/06	9/5/06	U.S. Attorney (D. Mont.) (Senate Confirmed)	

[52] Memorandum from George W. Bush for William W. Mercer (Sept. 6, 2006) (designation and prior position); Holland & Hart, LLP *William W. Mercer*, https://www.hollandhart.com/wwmercer (last visited Aug. 12, 2016) (prior positions); 28 C.F.R. 0.137(b) (2006) (explaining that the "Principal Deputy" to a position is the first assistant); Robert Boczkiewicz, *Bush Names Choice for 10th Circuit Court of Appeals*, Salt Lake Tribune, May 11, 2006 (demonstrating that another individual filled the principal deputy role).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Paul J. Hutter[53]	General Counsel, Department of Veterans Affairs	9/21/06	6/28/07	Assistant General Counsel, Department of Veterans Affairs	10/4/07

[53] Memorandum from George W. Bush for Paul J. Hutter (Sept. 21, 2006) (designation and prior position); *Personnel Announcement* (Sept. 21, 2006), http://www.presidency.ucsb.edu/ws/?pid=82722 (prior positions); *2004 Plum Book* 144 (showing that the position of Deputy General Counsel was between the General Counsel and the Assistant General Counsels).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Robert M. Couch[54]	General Counsel, Department of Housing and Urban Development	12/5/06	4/10/07	President, Government National Mortgage Association (Senate Confirmed)	6/13/07

[54] Memorandum from George W. Bush for Robert M. Couch (Dec. 5, 2006) (designation and prior position); *Personnel Announcement* (Apr. 4, 2007), http://www.presidency.ucsb.edu/ws/?pid=83548 (prior positions, none of which were within the Department of Housing and Urban Development).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas P. D'Agostino[55]	Under Secretary for Nuclear Security, Department of Energy	1/20/07	5/21/07	Deputy Director (Defense Programs), National Nuclear Security Administration, Department of Energy (Senate Confirmed)	8/1/07

[55] Memorandum from George W. Bush for Thomas P D'Agostino (Jan. 17, 2007) (designation, effective date of Jan. 20, 2007, and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 1st Sess. 699 (2007) (prior positions); 50 U.S.C. 2403 (identifying the Principal Deputy Administrator for Nuclear Security as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Howard Radzely[56]	Deputy Secretary of Labor	1/23/07	5/10/07	Solicitor of Labor (Senate Confirmed)	12/19/07

[56] Memorandum from George W. Bush for Howard Radzely (Jan. 23, 2007) (designation and prior position); *Nomination of Gregory Jacob and Howard Radzely: Hearing of the Senate Comm. on Health, Education, Labor, and Pensions*, 110th Cong., 1st Sess. 6 (2007) (prior position). The Department of Labor informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas J. Barrett[57]	Deputy Secretary of Transportation	2/22/07	6/11/07	Administrator, Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Senate Confirmed)	8/3/07

[57] Memorandum from George W. Bush for Thomas J. Barrett (Feb. 22, 2007) (designation and prior position); *Nominations to the Department of Transportation, the National Aeronautics and Space Administration, and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 110th Cong., 1st Sess. 16-18 (2007) (prior positions). The Department of Transportation informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kerri Layne Briggs[58]	Assistant Secretary of Education (Elementary and Secondary Education)	3/7/07	3/7/07	Deputy Assistant Secretary of Education, (Planning, Evaluation, and Policy Development)	6/22/07

[58] Memorandum from George W. Bush for Kerri Layne Briggs (Mar. 7, 2007) (designation and prior position); *Personnel Announcement* (Mar. 6, 2007), http://www.presidency.ucsb.edu/ws/?pid=83630 (prior positions); Senate Comm. on Homeland Security and Governmental Affairs, 110th Cong., 2d Sess., *Policy & Supporting Positions* 48-49, 51-52 (Comm. Print 2008) (*2008 Plum Book*) (showing positions within the Office of Elementary and Secondary Education).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Henrietta Holsman Fore[59]	Administrator, United States Agency for International Development	5/7/07	5/24/07	Under Secretary of State (Management) (Senate Confirmed)	11/13/07

[59] Memorandum from George W. Bush for Henrietta Holsman Fore (May 7, 2007) (designation and prior position); *Nominations of the 110th Congress: Hearings Before the Senate Comm. on Foreign Relations*, 110th Cong., 1st Sess. 559 (2007) (prior positions since 2001, none of which had been in the United States Agency for International Development); Glenn Kessler, *Rice Deputy Quits After Query Over Escort Service*, Washington Post (Apr. 28, 2007), at A1 (vacancy creation date).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Ondray T. Harris[60]	Director, Community Relations Service, Department of Justice	5/23/07	5/23/07	Deputy Chief, Employment Litigation Section, Civil Rights Division, Department of Justice	3/13/08
Ronald Jay Tenpas[61]	Assistant Attorney General (Environment and Natural Resources)	5/30/07	6/4/07	Associate Deputy Attorney General	12/13/07

[60] Memorandum from George W. Bush for Ondray T. Harris (May 23, 2007) (designation and prior position); *Personnel Announcement* (May 22, 2007), http://www.presidency.ucsb.edu/ws/?pid=83509 (prior positions); Dep't of Justice, *Organization Chart, Community Relations Service* (Apr. 29, 2005) (on file with the Office of the Solicitor General) (demonstrating that an individual from the Civil Rights Division would not have been the first assistant).

[61] Memorandum from George W. Bush for Ronald J. Tenpas (May 30, 2007) (designation and prior position); *Personnel Announcement* (May 30, 2007), http://www.presidency.ucsb.edu/ws/?pid=83531 (prior positions); *2008 Plum*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Craig W. Duehring[62]	Assistant Secretary of the Air Force (Manpower and Reserve Affairs)	6/29/07	11/15/07	Principal Deputy Assistant Secretary of Defense (Reserve Affairs)	12/19/07

Book 95-100 (demonstrating that none of Tenpas's prior positions were within the Environment and Natural Resources Division).

[62] Memorandum from George W. Bush for Craig W. Duehring (June 29, 2007) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 1st Sess. 1277 (2007) (prior position, which was in the Office of the Assistant Secretary of Defense for Reserve Affairs, and not in any office of the Air Force).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kerry N. Weems[63]	Administrator, Centers for Medicare and Medicaid Services, Department of Health and Human Services	9/4/07	5/3/07	Senior Advisor to the Administrator, Centers for Medicare and Medicaid Services, Department of Health and Human Services	

[63] Memorandum from George W. Bush for Kerry N. Weems (Sept. 4, 2007) (designation and prior position); *Nominations of Dr. Tevi Troy, David H. McCormick, Peter B. McCarthy, Kerry N. Weems, and Charles E.F Millard: Hearing Before the Senate Comm. on Finance* 110th Cong., 1st Sess. 136-137 (2007) (prior positions as of May 2007); Christopher Lee, *and a Departure*, Washington Post, Sept. 6, 2006, at A13 (vacancy created in October 2006); 2008 *Plum Book* 65, 66, 70-72 (demonstrating that none of Weems's prior positions held before October 2006 were within the Centers for Medicare and Medicaid Services).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Christopher A. Padilla[64]	Under Secretary of Commerce (International Trade)	9/26/07	9/4/07	Assistant Secretary of Commerce (Export Administration) (Senate Confirmed)	12/19/07
Grace C. Becker[65]	Assistant Attorney General (Civil Rights)	12/3/07	11/15/07	Deputy Assistant Attorney General (Civil Rights)	

[64] Memorandum from George W. Bush for Christopher A. Padilla (Sept. 26, 2007) (designation and prior position); *Nominations of Christopher Padilla, Christina Pearson, and Benjamin Sasse: Senate Hearing Before the Comm. on Finance*, 110th Cong., 1st Sess. 22 (2007) (prior positions); DOO 40-1, §4 (issuance date Aug. 2, 2004) (on file with the Office of the Solicitor General) (indicating that the Deputy Under Secretary for International Trade was the first assistant).

[65] Memorandum from George W. Bush for Grace C. Becker (Dec. 3, 2007) (designation and prior position); *Confirmation Hearing on the Nomination of Grace C. Becker to be Assistant Attorney General for the Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 110th Cong., 2d Sess. 7-8 (2008) (prior positions); 28 C.F.R. 0.137(b) (2007) (explaining that the "principal deputy" position is the first assistant); United States Government

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Nelson M. Ford[66]	Under Secretary of the Army	12/3/07	1/22/08	Assistant Secretary of the Army (Financial Management and Comptroller) (Senate Confirmed)	7/23/08

Printing Office, *Official Congressional Directory, 110th Congress* 642 (2007-2008) (demonstrating that the principal deputy position existed in the Civil Rights Division, and was filled by another individual).

[66] Memorandum from George W. Bush for Nelson M. Ford (Dec. 3, 2007) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 2d Sess. 281, 385 (2008) (prior position). The Department of Defense informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
John C. Rood[67]	Under Secretary of State (Arms Control and International Security)	9/26/07	3/22/07	Assistant Secretary of State (International Security and Nonproliferation) (Senate Confirmed)	
Jeffrey Leigh Sedgwick[68]	Assistant Attorney General (Justice Programs)	1/3/08	4/23/08	Director, Bureau of Justice Statistics, Department of Justice (Senate Confirmed)	10/2/08

[67] Memorandum from George W Bush for John C. Rood (Sept. 26, 2007) (designation and prior position); Office of the Historian, Dep't of State, John C. Rood (1968-) (Sept. 26, 2007), https://history.state.gov/departmenthistory/people/rood-john-c (prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[68] Memorandum from George W. Bush for Jeffrey Leigh Sedgwick (Jan. 3, 2008) (designation and prior position); *Executive Nominations: J. Patrick Rowan, of Maryland, Nominee to be an Assistant Attorney General, National Security Division; Jeffrey Leigh Sedgwick, Nominee to be Assistant Attorney General, Office of Justice Pro-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Richard Stickler[66]	Assistant Secretary of Labor (Mine Safety and Health)	1/4/08	1/9/07	Deputy Assistant Secretary of Labor	

grams; and William B. Carr, Jr., Nominee to be Member of the U.S. Sentencing Commission: Hearing Before the Senate Comm. on the Judiciary, 110th Cong., 2d Sess. 39 (2008) (prior position); 28 C.F.R. 0.137(b) (2008) (allowing the Attorney General to designate a first assistant when there is no principal deputy); Department of Justice, Order No. 2793-2005 (Dec. 28. 2005) (on file with the Office of the Solicitor General) (designating another individual as first assistant).

[66] Memorandum from George W. Bush for Richard Stickler (Jan. 4, 2008) (designation and prior position); U.S. Dep't of Labor, *About Acting Assistant Secretary for Mine Safety and Health Richard E. Stickler*, https://www.dol.gov/msha/stickler.htm (last visited Aug. 12, 2016) (noting that Stickler's prior service as the Assistant Secretary ended on December 31, 2007, which was when the vacancy was created).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jeffrey F. Kupfer[70]	Deputy Secretary of Energy	3/3/08	4/2/08	Chief of Staff, Department of Energy	
Patrick W. Dunne[71]	Under Secretary of Veterans Affairs for Benefits	4/2/08	7/30/08	Assistant Secretary of Veterans Affairs for Policy and Planning (Senate Confirmed)	10/2/08

[70] Memorandum from George W. Bush for Jeffrey P. Kupfer (Mar. 3, 2008) (designation and prior position); *Kupfer and Onley Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 2d Sess. 1, 4-5 (2008) (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

[71] Memorandum from George W. Bush for Patrick W. Dunne (Apr. 2, 2008) (designation and prior position); *Nominations of the 110th Congress: Hearing Before the Senate Comm. on Veterans' Affairs*, 110th Cong., 2d Sess. 93-94 (2008) (prior position); *2008 Plum Book* 133-134, 135 (showing that Dunne's prior position was not within the Veterans Benefits Administration).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kameran L. Onley[72]	Assistant Secretary of the Interior (Water and Science)	4/14/08	3/31/08	Assistant Deputy Secretary of the Interior	

[72] Memorandum from George W. Bush for Kameran L. Onley (Apr. 14, 2008) (designation and prior position); *Kupfer and Onley Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 2d Sess. 1 (2008) (prior position). The first assistant, if anyone, would have been the Deputy Assistant Secretary. See Memorandum from Mark Limbaugh to Gale Norton (Dec. 28, 2005) (on file with the Office of the Solicitor General) (designating the Deputy Assistant Secretary as the first assistant); Sec'y of the Interior, Order No. 3272 (July 13, 2007) (on file with the Office of the Solicitor General) (modifying the 2005 memorandum to indicate that no individual mentioned in that memorandum is a "first assistant," delegating various authorities to the Assistant Deputy Secretary other than those required by statute or regulation to be performed exclusively by the Assistant Secretary, and indicating that the order expires upon the designation of an Acting Assistant Secretary under the FVRA).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Reid Murtaugh[73]	Deputy Director for State, Local and Tribal Affairs, Office of National Drug Control Policy	4/28/08	7/15/08	U.S. Marshal (N.D. Ind.) (Senate Confirmed)	
Gregory G. Katsas[74]	Assistant Attorney General (Civil Division)	5/2/08	12/11/07	Principal Deputy Associate Attorney General	6/27/08

[73] Memorandum from George W. Bush for David Reid Murtaugh (Apr. 28, 2008) (designation and prior position); *Personnel Announcement* (July 15, 2008), http://www.presidency.ucsb.edu/ws/?pid=84067 (prior positions, none of which were within the Executive Office of the President).

[74] Memorandum from George W. Bush for Gregory G. Katsas (May 2, 2008) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 110th Cong., 2d Sess., Pt. 3, at 60 (2008) (prior positions); 28 C.F.R. 0.137(b) (2008) (indicating that the "Principal Deputy" is the first assistant); Dep't of Justice, *Organization Chart, Civil Division* (Aug. 5, 2004) (on file with the Office of the Solicitor General) (showing the existence of a principal deputy position within the Civil Division).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jason J. Fichtner[75]	Deputy Commissioner of Social Security	5/22/08	6/25/08	Associate Commissioner of Social Security (Retirement Policy)	
Matthew W. Friedrich[76]	Assistant Attorney General (Criminal)	5/22/08	12/11/08	Deputy Chief of Staff, Office of the Attorney General	

[75] Memorandum from George W. Bush for Jason J. Fichtner (undated) (designation and prior position); *Personnel Announcement* (May 22, 2008), http://www.presidency.ucsb.edu/ws/?pid=83958 (designation); *Personnel Announcement* (June 25, 2008), http://www.presidency.ucsb.edu/ws/?pid=84022 (prior position). The designation date listed is the date on which President Bush announced his intent to designate the official. The letter of designation itself is undated. The Social Security Administration informs this Office that in the relevant period, this position had no first assistant.

[76] Memorandum from George W. Bush for Matthew W. Friedrich (May 22, 2008) (designation and prior position); *Personnel Announcement* (Dec. 10, 2008), http://www.presidency.ucsb.edu/ws/?pid=85314 (prior positions); Press Release, Dep't of Justice, *Assistant Attorney General for the Criminal Division Alice S. Fisher to Leave Department of Justice*, Apr. 30, 2008, https://www.justice.gov/archive/opa/pr/2008/April/08-opa-359.html (showing that the

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael Bruce Donley[77]	Secretary of the Air Force	6/21/08	6/25/08	Director of Administration and Management, Office of the Secretary of Defense	10/2/08
Brian H. Hook[78]	Assistant Secretary of State (International Organization Affairs)	7/2/08	6/27/08	Deputy Assistant Secretary of State (International Organization Affairs)	10/2/08

vacancy arose as of May 23, 2008); Marisa Taylor, *Justice's Criminal Division Gets a New Chief*, McClatchy DC, May 22, 2008, http://www.mcclatchydc.com/news/politics-government/article24484459.html (showing that Friedrich had left the Criminal Division by May 2007).

[77] Memorandum from George W. Bush for Michael Bruce Donley (June 20, 2008) (designation, effective date of June 21, 2008, and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 2d Sess. 416 (2008) (prior positions); Exec. Order No. 12,909, 59 Fed. Reg. 21,909 (Apr. 22, 1994) (identifying the Under Secretary of the Air Force as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Gordon S. Heddell[79]	Inspector General, Department of Defense	7/14/08	6/1/09	Inspector General, Department of Labor (Senate Confirmed)	7/10/09
James A. Slutz[80]	Assistant Secretary of Energy (Fossil Energy)	7/30/08	7/30/08	Deputy Assistant Secretary of Energy (Oil and Natural Gas)	

[78] Memorandum from George W. Bush for Brian H. Hook (July 2, 2008) (designation and prior position); Dep't of State, *Biography, Brian H. Hook*, (Oct. 24, 2008), http://2001-2009.state.gov/r/pa/ei/biog/106592.htm (prior positions); 1 Dep't of State, *Foreign Affairs Manual* 332.1 (2007) (on file with the Office of the Solicitor General) (demonstrating that the Principal Deputy Assistant Secretary of State (International Organization Affairs) is the first assistant).

[79] Memorandum from George W. Bush for Gordon S. Heddell (July 14, 2008) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 887 (2009) (prior positions, none of which were within the Department of Defense).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael W. Hager[81]	Director, Office of Personnel Management	8/14/08	8/1/08	Assistant Secretary of Veterans Affairs (Human Resources and Management) (Senate Confirmed)	

[80] Memorandum from George W. Bush for James A. Slutz (July 30, 2008) (designation and prior position); Wilson Ctr., *James A. Slutz, Bio* http://www.wilsoncenter.org/person/james-slutz (last visited Aug. 12, 2016) (prior positions). Although Slutz served as the Acting Principal Deputy Assistant Secretary between October 2007 and July 2008, see, *e.g.*, *Schools Get Coal Research Funds*, Inside Energy Extra, Nov. 21, 2007 (identifying Slutz as the Acting Principal Deputy Assistant Secretary); *Technologies Among Most Significant New Products Worldwide*, States News Service, July 10, 2008 (same), he was only acting in that position and did not hold the Principal Deputy position itself.

[81] Memorandum from George W. Bush for Michael W. Hager (Aug. 11, 2008) (designation, effective date of Aug. 14, 2008, and prior position); *Personnel Announcement* (Aug. 1, 2008), http://www.presidency.ucsb.edu/ws/?pid=84103 (giving Hager's two immediately prior positions as of August 2008, neither of which were in the Office of Personnel Management); *Nominations of the 110th Congress: Hearing Before the Senate Comm. on Veterans' Affairs*, 110th Cong., 1st Sess. 56 (2007) (prior positions as of November 2007, none of which were in the Office of Personnel Management).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Santanu K. Baruah[82]	Administrator, Small Business Administration	8/18/08	6/25/08	Assistant Secretary of Commerce (Economic Development) (Senate Confirmed)	

[82] Memorandum from George W. Bush for Santanu K. Baruah (Aug. 13, 2008) (designation, effective date of Aug. 18, 2008, and prior position); *Personnel Announcement* (June 25, 2008), http://www.presidency.ucsb.edu/ws/?pid=84022 (most recent prior positions, none of which were in the Small Business Administration); *Nominations of Santanu K. Baruah; George M. Gray; Lyons Gray; H. Dale Hall, and Edward McGaffigan, Jr.: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 1st Sess. 16, 33 (2005) (prior positions as of September 2005, none of which were in the Small Business Administration).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Kelly[83]	Administrator, National Highway Traffic Safety Administration, Department of Transportation	9/2/08	9/29/08	Chief of Staff, National Highway Traffic Safety Administration, Department of Transportation	

[83] Memorandum from George W. Bush for David Kelly (Sept. 2, 2008) (designation and prior position); *Personnel Announcement* (Sept. 29, 2008), http://www.presidency.ucsb.edu/ws/?pid=84458 (prior positions); 49 C.F.R. 501.4(a) (2008) (identifying the Deputy Administrator as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jerry Gayle Bridges[84]	Inspector General, Department of Education	9/10/08	9/9/08	Chief Financial Officer, Corporation for National and Community Service (Senate Confirmed)	
Lafe Solomon[85]	General Counsel, National Labor Relations Board	6/21/10	1/5/11	Director, Office of Representation Appeals, National Labor Relations Board	

[84] Memorandum from George W. Bush for Jerry Gayle Bridges (Sept. 10, 2008) (designation and prior position); *Personnel Announcement* (Sept. 9, 2008), http://www.presidency.ucsb.edu/ws/?pid=84400 (prior positions, none of which were within the Department of Education).

[85] Memorandum from Barack Obama for Lafe E. Solomon (June 18, 2010) (designation, effective date of June 21, 2010, and prior position); Press Release, Office of the Gen. Counsel, NLRB, *Veteran NLRB Attorney Lafe Solomon Named Acting General Counsel* (June 20, 2010), http://cdn.cnsnews.com/documents/NLRB%20 press%20release.pdf (prior position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Arun Majumdar[86]	Under Secretary of Energy	3/16/11	11/30/11	Director of Advanced Research Projects Agency-Energy, Department of Energy (Senate Confirmed)	

[86] Memorandum from Barack Obama for Arun Majumdar (Mar. 16, 2011) (designation and prior position); *Majumdar Nomination: Hearing Before the Senate Comm. on Energy and Natural Resources*, 112th Cong., 1st Sess. 6 (2011) (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Carol J. Galante[87]	Assistant Secretary of Housing and Urban Development (Federal Housing Commissioner)	7/12/11	10/20/11	Deputy Assistant Secretary of Housing and Urban Development for Multi-Family Housing Programs	12/30/12

[87] Memorandum from Barack Obama for Carol J. Galante (July 5, 2011) (designation, effective date of July 12, 2011, and prior position); *Nominations of Maurice A. Jones, Carol J. Galante, and Thomas H. Hoenig: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 112th Cong., 1st Sess. 7, 10 (2011) (prior position); 71 Fed. Reg. 61,500 (Oct. 18, 2006) (designating the General Deputy Assistant Secretary for Housing as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Marcilynn Burke[88]	Assistant Secretary of the Interior (Land and Minerals Management)	7/28/11	2/6/12	Deputy Director for Programs and Policy, Bureau of Land Management, Department of the Interior	

[88] Memorandum from Barack Obama for Marcilynn A. Burke (July 28, 2011) (designation and prior position); *Sieminski, Burke, Clark, and Norris Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 112th Cong., 2d Sess. 1, 11 (2012) (prior position); Memorandum from Wilma Lewis to Ken Salazar (May 20, 2011) (on file with the Office of the Solicitor General) (explaining that the first assistant was a Deputy Assistant Secretary).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
B. Todd Jones[89]	Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice	8/30/11	1/24/13	U.S. Attorney (D. Minn.) (Senate Confirmed)	7/31/13
Rebecca M. Blank[90]	Deputy Secretary of Commerce	10/20/11	11/1/11	Under Secretary of Commerce for Economic Affairs (Senate Confirmed)	3/29/12

[89] Memorandum from Barack Obama for B. Todd Jones (Aug. 29, 2011) (designation, effective date of Aug. 30, 2011, and prior position); Dep't of Justice, *Organization Chart, Bureau of Alcohol, Tobacco, Firearms, and Explosives* (Oct. 17, 2005) (on file with the Office of the Solicitor General) (showing that a U.S. Attorney would not have been the first assistant).

[90] Memorandum from Barack Obama for Rebecca M. Blank (Oct. 20, 2011) (designation and prior position); *Nominations to the U.S. Department of Commerce and the Federal Trade Commission: Hearing Before the Senate*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Rose Eilene Gottemoeller[91]	Under Secretary of State (Arms Control and International Security)	2/7/12	9/11/12	Assistant Secretary of State (Verification and Compliance) (Senate Confirmed)	3/6/14
Stuart F. Delery[92]	Assistant Attorney General (Civil)	3/10/12	3/21/13	Counselor to the Attorney General	8/1/13

Comm. on Commerce, Science, and Transportation, 112th Cong., 1st Sess. 29 (2011) (prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[91] Memorandum from Barack Obama for Rose Eilene Gottemoeller (Feb. 3, 2012) (designation, effective date of Feb. 7, 2012, and prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[92] Memorandum from Barack Obama for Stuart F. Delery (Mar. 9, 2012) (designation, effective date of Mar. 10, 2012, and prior position); Sari Horwitz, *Tony West Is Promoted to Associate Attorney General*, Washington Post, Feb. 28, 2012, at A02 (vacancy creation date); U.S. Senate Comm. on the Judiciary, *Questionnaire for Non-Judicial Nominees* 1-2, https://www.judiciary.senate.gov/imo/media/doc/Delery%20Senate%20Questionnaire%20Final.pdf

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Tony West[93]	Associate Attorney General	3/10/12	9/20/12	Assistant Attorney General (Civil) (Senate Confirmed)	7/25/13
Jessica Lynn Wright[94]	Under Secretary of Defense (Personnel and Readiness)	1/1/13	7/18/13	Assistant Secretary of Defense (Reserve Affairs) (Senate Confirmed)	6/25/14

(prior positions, including showing that service as the Principal Deputy Assistant Attorney General did not begin until November 2012); 28 C.F.R. 0.137(b) (2012) (indicating that the principal deputy is the first assistant).

[93] Memorandum from Barack Obama for Tony West (Mar. 9, 2012) (designation, effective date of Mar. 10, 2012, and prior position); Dep't of Justice, *Meet the Associate Attorney General* (Sept. 17, 2014), https://www.justice.gov/asg/meet-associate-attorney-general-old (prior positions); 28 C.F.R. 0.137(b) (2012) (indicating that the Principal Deputy is the first assistant); House Comm. on Oversight and Government Reform, 112th Cong., 2d Sess., *Policy and Supporting Positions* 93 (Comm. Print 2012) (*2012 Plum Book*) (showing the existence of a principal deputy position).

[94] Memorandum from Barack Obama for Jessica Lynn Wright (Dec. 28, 2012) (designation, effective date of Jan. 1, 2013, and prior position); Dep't of Defense, *Biography, Jessica L. Wright, Acting Under Secretary of De-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kathryn Thomson[96]	General Counsel, Department of Transportation	5/2/13	9/23/13	Chief Counsel, Federal Aviation Administration, Department of Transportation	3/27/04

fense for Personnel and Readiness (July 10, 2013), http://docs.house.gov/meetings/AS/AS00/20130710/101105/HHRG-113-AS00-Bio-WrightJ-20130710.pdf (prior positions); 10 U.S.C. 137a (identifying the Principal Deputy Under Secretary of Defense (Personnel and Readiness) as the first assistant).

[96] Memorandum from Barack Obama for Kathryn Thomson (May 2, 2013) (designation and prior position); Dep't of Transp. *Kathryn B. Thomson*, https://cms.dot.gov/administrations/office-general-counsel/kathryn-b-thomson (April 22, 2014) (prior positions); Dep't of Transp., *Position Description, Deputy General Counsel* (July 24, 2009) (on file with the Office of the Solicitor General) (identifying the Deputy General Counsel as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James H. Shelton, III[96]	Deputy Secretary of Education	6/10/13	9/11/13	Assistant Deputy Secretary of Education for Innovation and Improvement	3/12/14
Jonodev Chaudhuri[97]	Chairman, National Indian Gaming Commission, Department of the Interior	10/28/13	7/22/14	Member and Vice Chairman of the National Indian Gaming Commission, Department of the Interior	4/16/15

[96] Memorandum from Barack Obama for James H. Shelton, III (June 10, 2013) (designation and prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[97] Memorandum from Barack Obama for Jonodev Osceola Chaudhuri (Oct. 28, 2013) (designation and prior position); *Nomination of Jonodev Osceola Chaudhuri to be Chairman of the National Indian Gaming Commission: Hearing Before the Senate Comm. on Indian Affairs*, 113th Cong., 2d Sess. 10 (2014) (prior positions, including that his service as the Vice Chair only began in September 2013); Lenzy Krehbiel-Burton, *Muscogree (Creek) Nation Ci-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Victor M. Mendez[98]	Deputy Secretary of Transportation	12/30/13	5/15/14	Administrator, Federal Highway Administration, Department of Transportation (Senate Confirmed)	7/24/14

tizen Nominated to Lead National Indian Gaming Commission, Tulsa World, July 25, 2014, http://www.tulsworld.com/news/state/muscogee-creek-nation-citizen-nominated-to-lead-national-indian-gaming/article_f3298aa3-5050-5689-87c8-a59550407a51.html (explaining that the vacancy arose in September 2013).

[98] Memorandum from Barack Obama for Victor M. Mendez (Dec. 18, 2013) (designation, effective date of Dec. 30, 2013, and prior position). The Department of Transportation informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Peter M. Rogoff[99]	Under Secretary of Transportation for Policy	1/25/14	5/15/14	Administrator, Federal Transit Administration, Department of Transportation (Senate Confirmed)	7/24/14

[99] Memorandum from Barack Obama for Peter M. Rogoff (Jan. 24, 2014) (designation, effective date of Jan. 25, 2014, and prior position); *Nominations to the U.S. Department of Commerce, the U.S. Department of Transportation, and the Consumer Production Safety Commission: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 113th Cong., 2d Sess. 30-31 (2014) (prior positions); Memorandum from the Secretary of Transportation to the Assistant Secretary for Transportation Policy (May 25, 2003) (on file with the Office of the Solicitor General) (designating the Assistant Secretary for Transportation Policy as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Amias Moore Gerety[100]	Assistant Secretary of the Treasury (Financial Institutions)	4/6/14	2/25/15	Deputy Assistant Secretary of the Treasury for the Financial Stability Oversight Council	Nomination pending

[100] Memorandum from Barack Obama for Amias Moore Gerety (Mar. 31, 2014) (designation, effective date of Apr. 6, 2014, and prior position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (Feb. 24, 2015), https://www.whitehouse.gov/the-press-office/2015/02/24/president-obama-announces-more-key-administration-posts (prior positions); Timothy F. Geithner, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (June 25, 2012) (on file with the Office of the Solicitor General) (designating as first assistant the Deputy Assistant Secretary for Small Business, Housing, and Community Development Policy).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Bruce H. Andrews[101]	Deputy Secretary of Commerce	6/9/14	5/22/14	Chief of Staff, Office of the Secretary of Commerce	7/24/14
Thomas F. Scott Darling, III[102]	Administrator, Federal Motor Carrier Safety Administration, Department of Transportation	8/25/14	8/5/15	Chief Counsel, Federal Motor Carrier Safety Administration, Department of Transportation	7/14/16

[101] Memorandum from Barack Obama for Bruce H. Andrews (June 4, 2014) (designation, effective date of June 9, 2004, and prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[102] Memorandum from Barack Obama for Thomas F. Scott Darling, III (Aug. 25, 2014) (designation and prior position); Federal Motor Carrier Safety Admin., *Administrator*, https://www.fmcsa.dot.gov/mission/leadership/administrator-0 (July 25, 2016) (prior positions); Fed. Motor Carrier Safety Admin., Order, *Order of Succession for*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Stuart Delery[103]	Associate Attorney General (Civil)	9/16/14	1/27/15	Assistant Attorney General (Civil) (Senate Confirmed)	

the Administrator 1102.1c (Oct. 18, 2012) (on file with the Office of the Solicitor General) (identifying the Deputy Administrator as the first assistant).

[103] Memorandum from Barack Obama for Stuart F. Delery (Sept. 16, 2014) (designation and prior position); Press Release, Office of the Press Secretary The White House, *President Obama Announces More Key Administration Posts* (Jan. 22, 2015), https://www.whitehouse.gov/the-press-office/2015/01/22/president-obama-announces-more-key-administration-posts (prior positions); Press Release, Dep't of Justice, *Attorney General Holder Announces Stuart Delery to Serve as Acting Associate Attorney General* (Sept. 5, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-stuart-delery-serve-acting-associate-attorney-general; 28 C.F.R. 0.137(b) (indicating that the Principal Deputy is the first assistant); *2012 Plum Book* 93 (showing the existence of a principal deputy position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Albert Stanley Meiburg[104]	Deputy Administrator, Environmental Protection Agency	10/3/14	1/27/15	Senior Advisor to the Administrator, Environmental Protection Agency	Nomination pending
Karen Bollinger DeSalvo[105]	Assistant Secretary of Health and Human Services (Health)	10/22/14	5/7/15	National Coordinator for Health Information Technology, Department of Health and Human Services	Nomination pending

[104] Memorandum from Barack Obama for Albert Stanley Meiburg (Oct. 3, 2014) (designation and prior position). The Environmental Protection Agency informs this Office that at the time the vacancy began, this position had no first assistant.

[105] Memorandum from Barack Obama for Karen Bollinger DeSalvo (Oct. 22, 2014) (designation and prior position); Dept of Health & Human Servs., *Karen B. DeSalvo, MD, MPH, Msc* (May 5, 2016), http://www.hhs.gov/about/

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sally Quillian Yates[106]	Deputy Attorney General	1/11/15	1/8/15	U.S. Attorney (N.D. Ga.) (Senate Confirmed)	5/13/15

leadership/karen-desalvo/index.html# (prior position); *2012 Plum Book* 61-62 (demonstrating that DeSalvo's prior HHS position was not within the Office of the Assistant Secretary for Health).

[106] Memorandum from Barack Obama for Sally Quillian Yates (Jan. 9, 2015) (designation and effective date of Jan. 11, 2015); U.S. Senate Comm. on the Judiciary, *Questionnaire for Non-Judicial Nominees* 1-2, https://www.judiciary.senate.gov/imo/media/doc/2015%20DAG%20Nom%20Yates%20SJQ%20Public%20Questionnaire.pdf (prior positions); 28 C.F.R. 0.137(b) (explaining that the "Principal Deputy" to a position is the first assistant); *2012 Plum Book* 89 (showing the existence of a Principal Associate Deputy Attorney General position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Seth B. Carpenter[107]	Assistant Secretary of the Treasury (Financial Markets)	1/30/15	9/8/14	Deputy Assistant Secretary of the Treasury (Economic Policy)	

[107] Memorandum from Barack Obama for Seth B. Carpenter (Jan. 30, 2015) (designation and prior position); Dep't of the Treasury, *About, Seth Carpenter* (Aug. 20, 2015), http://www.treasury.gov/about/organizational-structure/pages/carpenter-e.aspx (designation and earlier positions); Timothy F. Geithner, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (June 25, 2012) (on file with the Office of the Solicitor General) (designating as first assistant the Deputy Assistant Secretary for Federal Finance).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Adam J. Szubin[108]	Under Secretary of the Treasury (Terrorism and Financial Crimes)	2/9/15	4/20/15	Director, Office of Foreign Assets Control, Department of the Treasury	Nomination pending
Brad R. Carson[109]	Under Secretary of Defense (Personnel and Readiness)	4/2/15	7/8/15	Under Secretary of the Army (Senate Confirmed)	

[108] Memorandum from Barack Obama for Adam J. Szubin (Feb. 6, 2015) (designation, effective date of Feb. 9, 2015, and prior position); Dep't of the Treasury, *About, Adam J. Szubin* (Aug. 24, 2015), http://www.treasury.gov/about/organizational-structure/pages/szubin-a.aspx (prior positions); Jacob J. Lew, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department of the Treasury* (Aug. 26, 2014) (on file with the Office of the Solicitor General) (designating as first assistant the Assistant Secretary for Terrorist Financing).

[109] Memorandum from Barack Obama for Brad R. Carson (Apr. 2, 2015) (designation and prior position); Office of the Under Sec'y for Pers. & Readiness, Dep't of Def., *Performing the Duties of the PDUSD*, http://prhome.defense.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Mary Wakefield[110]	Deputy Secretary of Health and Human Services	4/14/15	7/13/15	Administrator, Health Resources and Services Administration, Department of Health and Human Services	Nomination pending

gov/Leadership/bradCarson.aspx (last visited Aug. 12, 2016) (prior positions); 10 U.S.C. 137a (identifying the Principal Deputy Under Secretary of Defense (Personnel and Readiness) as the first assistant).

[110] Memorandum from Barack Obama for Mary Wakefield (Apr. 8, 2015) (designation, effective date of Apr. 14, 2015, and prior position). The Department of Health and Human Services informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Karl Boyd Brooks[111]	Assistant Administrator (Administration and Resources Management), Environmental Protection Agency	5/13/15	5/14/15	Deputy Assistant Administrator (Administration and Resource Management), Environmental Protection Agency	

[111] Memorandum from Barack Obama for Karl Boyd Brooks (May 13, 2015) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (May 13, 2015), https://www.whitehouse.gov/the-press-office/2015/05/13/president-obama-announces-more-key-administration-posts (prior positions, none of which was the principal deputy); Daniel Arrieta, *After Departures, McCarthy Taps 'Acting' Officials to Fill Crucial Vacancies*, Inside Washington Publishers, http://iwpnews.com/EPA-Daily-News/Daily-News/feed/rss/menu-id-1046/Page-20.html, Aug. 10, 2016 (showing that a different individual served as principal deputy at the time the vacancy was created).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sarah Elizabeth Feinberg[112]	Administrator, Federal Railroad Administration, Department of Transportation	6/2/15	6/2/15	Deputy Administrator of the Federal Railroad Administration, Department of Transportation	10/28/15

[112] Memorandum from Barack Obama for Sarah Elizabeth Feinberg (June 2, 2015) (designation and prior position); Progressive Railroading, *Joseph Szabo Says Goodbye to Federal Railroad Administration, Hello to Chicago Planning Agency* (Jan. 2015), http://www.progressiverailroading.com/people/article/Joseph-Szabo-says-goodbye-to-Federal-Railroad-Administration-hello-to-Chicago-planning-agency--43214 (vacancy created in January 2015); *Nomination of Sarah E. Feinberg to be Administrator, Federal Railroad Administration, U.S. Department of Transportation: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 114th Cong., 1st Sess. 11 (2015) (prior positions, including that Feinberg only became the Deputy Administrator in January 2015); Fed. R.R. Admin., *Order 1100.23F, Change 1*, at 12 (Sept. 10, 2012) (on file with the Office of the Solicitor General) (identifying the Deputy Administrator as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Beth F. Cobert[113]	Director, Office of Personnel Management	7/10/15	11/10/15	Deputy Director for Management, Office of Management and Budget	Nomination pending

[113] Memorandum from Barack Obama for Beth F Cobert (July 10, 2015) (designation and prior position); OPM, *Beth F. Cobert, Acting Director*, https://www.opm.gov/about-us/our-people-organization/senior-staff-bios/beth-f-cobert/ (last visited Aug. 12, 2016) (designation and prior positions, none of which were in the Office of Personnel Management).

APPENDIX B

1. 5 U.S.C. 3345 provides:

Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer

or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

2. 5 U.S.C. 3346 provides:

Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

3. 5 U.S.C. 3347 provides:

Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) a statutory provision expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

4. 5 U.S.C. 3348 provides:

Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided

by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

5. 5 U.S.C. 3349 provides:

Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to

the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

6. 5 U.S.C. 3349a provides:

Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

7. 5 U.S.C. 3349b provides:

Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

8. 5 U.S.C. 3349c provides:

Exclusion of certain officers

Sections 3345 through 3349b shall not apply to—

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

9. 5 U.S.C. 3349d provides:

Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.